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THE  
Ontario Law Reports

CASES DETERMINED IN THE SUPREME COURT  
OF ONTARIO (APPELLATE AND HIGH  
COURT DIVISIONS).

1925-1926

REPORTED UNDER THE AUTHORITY OF THE  
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**JUDGES**  
OF THE  
**SUPREME COURT OF ONTARIO**

DURING THE PERIOD OF THESE REPORTS.

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APPELLATE DIVISION.

*First Divisional Court.*

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“ “ WILLIAM NASSAU FERGUSON, J.A.

“ “ ROBERT SMITH, J.A.

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“ “ ROBERT GRANT FISHER, J.

“ “ WILLIAM HENRY WRIGHT, J.

“ “ DAVID INGLIS GRANT, J.



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*18th March, 1926.*

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*15th April, 1926.*

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*20th May, 1926.*

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*17th June, 1926.*

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## ERRATA.

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Page 56, 8th line from bottom, *for* “ 38 ” *read* “ 381.”

Page 62, 3rd line from bottom, *for* “ *Hall* ” *read* “ *Holt*.”

Page 148, 9th line of head-note, *for* “ 94 ” *read* “ 194.”

Page 245, head-note, 3rd line from bottom, *for* “ 523 ” *read* “ 533.”

Page 254, 7th line from bottom, *for* “ 207 ” *read* “ 27.”

Page 632, 22nd line from top, *before* “ Taunt.” *insert* “ 7.”

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# REPORTS OF CASES

DETERMINED IN THE

## SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

WEIL V. COLLIS LEATHER CO. LTD.

1924.

June 20.

1925.

Oct. 30.

*Sale of Goods—Refusal to Accept—Existence and Validity of C.I.F. Contracts—Requisites of—Quality of Goods Delivered—Defects—Overweight—Description—"Not of the Right Quality"—Previous Acceptance of Similar Goods—Delay in Inspection—Waiver—Property not Passing to Vendees—Condition of Contract—Sale of Goods Act, 1920, secs. 2(n), 30(3), (4)—Right to Reject the whole where Part not according to Description—Evidence—Findings of Trial Judge—Demeanour of Witnesses—Appeal.*

The plaintiffs, a firm in France, engaged in the sale of calfskins, entered into four contracts (March, April, May, and June, 1920) with the defendants, tanners in Ontario, for the sale and purchase of calfskins. The contracts were all c.i.f. New York. Calfskins were shipped accordingly; but in June the defendants, alleging that the skins which were being sent forward were unsatisfactory, refused to accept any more. The New York agents of the plaintiffs, after holding the skins for a time, sold for the best price available, and then brought this action for damages for the non-acceptance.

The contracts called for "Paris and best French trimmed calfskins" and the approximate weight per skin was specified in each contract. The skins were rejected because "not of the right quality:"—

*Held*, upon the evidence, that the skins fully answered the description, except in respect of the weight.

The c.i.f. contract does not differ from any other contract in certain requirements, one of which is that the goods shall answer the description in the contract.

The fact that previous shipments of similar goods were accepted and the goods used by the defendants did not bar them from raising an objection later to other goods.

The defendants would not, by rejection on an insufficient ground, be precluded from supporting the rejection on other and valid grounds; but, in any case, "not of the right quality" was broad enough to cover the objection to the weight.

There may have been unreasonable delay in inspecting the skins, but the plaintiffs did not entitle themselves to recover on the strict reading of a c.i.f. contract: a contract of insurance and documents of title should in strictness have been tendered to the defendants; and, assuming that the plaintiffs had not, by asserting property in the

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skins and refusing to allow the defendants to have them until they could pay for them, put an end to the contracts, their conduct was a waiver of any right they might have to a speedy acceptance or rejection.

Having regard to the whole course of dealing between the parties, the defendants had not lost their *prima facie* right to reject the skins, if in fact they did not answer the contract, and were entitled to set up the one defect—overweight; and a substantial proportion of the skins was overweight.

The property not having passed, the description of the skins as being between certain weights was a condition, not a warranty: sec. 2(n) of the Sale of Goods Act, 1920.

The defendants had the right to reject all the skins: sec. 30(3); sec. 30(4) did not apply.

Review of the authorities.

*Per* RIDDELL, J.A.:—An appellate court should not attempt to weigh the credit to be given to witnesses where the trial Judge has expressed his view, derived from a consideration of their conduct and demeanour in the witness-box. Although the trial Judge may not state that his view of the credibility of witnesses depended upon their demeanour, an appellate court should not consider itself in as good a position as the Judge to weigh the evidence and determine what effect should be given to it. *Curtis Brothers v. Hayes* (1923), 24 O.W.N. 193, referred to.

### ACTION for damages for refusal to accept goods.

The action and a counterclaim were tried by ROSE, J., without a jury, at a Toronto sittings.

*R. S. Robertson*, K.C., and *G. M. Huycke*, for the plaintiffs.

*D. L. McCarthy*, K.C., *J. W. Bain*, K.C., and *M. L. Gordon*, for the defendants.

June 20, 1924. ROSE, J.:—The plaintiffs are dealers in French calfskins and other skins. They carry on business in Paris and New York. The defendants are tanners carrying on business at Aurora, Ontario. The plaintiffs sue for damages for the non-acceptance of some 24,000 skins shipped from Paris to the defendants in the spring and summer of 1920. The defendants, besides denying liability, set up a large counterclaim for damages for defects in skins accepted and paid for and for short delivery and in respect of other matters.

The parties had had business relations for some years and their transactions had been large. For instance, in the year preceding that in which the dispute arose, skins to the value of about a million dollars had been delivered and paid for without any serious question arising either as to the existence or the meaning of the contracts under which the deliveries were made or as to the quality or quantity of the goods delivered: such minor claims as there were had been adjusted without difficulty. But in the summer of

1920 there was a drop in the price of leather, indeed leather became very hard to sell at any reasonable price; the defendants, as their president and general manager said in a letter of the 14th June, were receiving "cancellations of orders by every mail;" and, after some negotiations to which reference will have to be made later on, the defendants refused to accept any further deliveries. They seek to justify their refusal by raising questions as to the existence of some of the contracts under which the plaintiffs were purporting to make delivery and questions as to the quality of the skins that had been sent from Paris and other questions that in normal conditions would not have been raised; and it becomes necessary to see whether in any of these questions raised there is a valid defence.

The first question is as to the existence of two of the contracts set up by the plaintiffs. The plaintiffs say that there were four subsisting contracts, called at the trial the March, the April, the May, and the June contracts.

Of the March contract, which is for about 20,000 skins, there is a memorandum in writing dated the 22nd March, signed by the defendants. No question is raised as to its validity.

The question as to the April contract arises thus: On the 11th March the defendants wrote to the plaintiffs' New York office making an offer for 40,000 skins. The plaintiffs in New York were in doubt as to the ability of their Paris office to supply so many. Accordingly the "March" contract for 20,000 was signed and communications passed between the New York and Paris offices of the plaintiffs with reference to the other 20,000. The result was an offer on the 5th April of the 20,000 at a price in advance of that offered by the defendants, and a telegram in answer by the defendants on the 6th April: "Price too high will not pay more than sixty-five" (cents a pound for untrimmed skins) "and eighty" (cents a pound for trimmed skins), and a telegram by the plaintiffs on the 11th April: "Paris accepts your order 20,000 calfskins. Sending contract." The defendants' president and general manager, Mr. Bonisteel, was in New York about the 22nd March, when the "March" contract was signed. He says that on hearing from the plaintiffs that on that day they could not sell more than 20,000 skins, he informed the plaintiffs' manager, Mr. Cahn, that he would have to get the balance of his 40,000 elsewhere, and that he did buy 21,000 from other dealers, so that his offer to take 40,000 from the plaintiffs was no longer open. In fact, his purchases from other dealers were of New York skins, which do not serve the same purpose as French skins, and I do not

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accept his statement that he told Mr. Cahn anything to the effect that his offer to take 40,000 skins from the plaintiffs (20,000 in addition to those covered by the March contract) was revoked. The statement is inconsistent with his later letters and telegrams and with the actions of both the plaintiffs and the defendants and is denied by Mr. Cahn, and where there is a difference between these two witnesses I prefer Mr. Cahn's evidence.

Counsel for the defendants suggest that Mr. Cahn is entirely discredited by some evidence that he gave on his examination for discovery. On that examination he made statements now found to be untrue on the subject of allowances made by his firm to Albert Trostel and Sons Co., the purchasers from them of some of the skins refused by the defendants, and he said that a certain file contained all the correspondence that there was in his office between his firm and the Trostel company, whereas there was further important correspondence. The fact that the price to the Trostel company was reduced by the plaintiffs upon certain complaints being made was, obviously, of importance on the inquiry as to the quality of the skins, and the non-disclosure naturally arouses suspicion; but, having watched Mr. Cahn as he gave his evidence and having heard his explanation, I am inclined to attribute his misstatements to the all too common practice of swearing positively to what is a matter of belief rather than of knowledge. To find that a principal who is under examination has sent his clerk for the papers relating to a certain transaction and then has sworn positively that the papers brought to him are all that are in existence occasions no surprise. It indicates a carelessness that is reprehensible on the part of one who has assumed the obligation of an oath, but I do not think that of itself it indicates that the witness is prepared to swear to what he does not believe—certainly, in the present case I do not think that what was said about the letters destroys Mr. Cahn's credit. And as to the negotiations it appears that they were not conducted by Mr. Cahn; and while, again, there was carelessness, I do not think there was perjury. Notwithstanding the vigorous attack made upon him, Mr. Cahn seemed to me to be much more to be depended upon than the chief witness on the defendants' side.

It was necessary to make at some stage a finding as to the credibility of Mr. Cahn and Mr. Bonisteel respectively. Having made it, I return to the "April" contract. Mr. Bonisteel went to Europe in May. He left his office on the 7th and sailed from St. John on the 9th, before the telegram from the plaintiffs to the defendants accepting the offer to buy the additional 20,000 skins



was received. But he had left men in charge of the defendants' office, who, by a letter which he says he received in London about the end of April, advised him of what had been done, and he did not cause any repudiation to be communicated to the plaintiffs. On the contrary, the defendants accepted and paid for some of the skins shipped under this "April" contract. In my opinion the "April" contract is established.

The "May" contract is for about 5,000 skins. It was made in Paris and the requisite memorandum was duly signed.

The so called "June" contract was really made on the 28th May. The plaintiffs in Paris telegraphed an offer to Mr. Bonisteel in Liverpool. Mr. Bonisteel answered on the 27th May: "Cannot pay price. Offer 65 for Paris trimmed. Cable Aurora if accepted." The plaintiffs cabled to the defendants at Aurora: "Accept your order ten thousand Paris trimmed usual conditions sixty-five cents." The only suggestion of a reason for saying that a contract was not made was in a telegram and a letter in which Mr. Bonisteel, perhaps because his memory was at fault, said that his telegram of the 27th May stated that he would confirm the contract at Aurora if he decided to take the skins. There was a valid contract for these 10,000 skins.

The next question is whether the skins shipped answered the contract description.

In Paris it is the custom of abattoirs large and small to sell by auction at the beginning of each month the skins that they expect to take off during the month. The plaintiffs bid at the auctions, and receive daily, and salt and store, the skins taken off by those butchers with whom they enter into contracts. In other cities the practice is for the abattoirs or the auctioneers to collect the skins day by day, salt them and keep them until the end of the month and then sell them by auction. Some of the cities have the reputation of shewing greater skill than others in the taking off of the skins. It is said that in all French cities the skins are scarred to a greater extent than they are in New York—but in some French cities they are scarred more than in others. Some cities, e.g., Dijon, produce skins so good that they would not be delivered under a contract that did not call for them specifically. Other places in the south have the reputation of taking the skins off so badly that they are nearly all "seconds," i.e., are so deeply butcher-scarred that a man testing them can force his thumb through the skin. In between these are the cities meant to be designated by the expression "Best French cities" or "Best French," used in the contracts in question in this action. It is

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said that in Paris the custom is to trim the skins by taking off the heads and part of the shanks, whereas in other places the heads and shanks are sometimes left on.

The "March" contract calls for about 10,000 "Paris and best French trimmed calfskins," and about 10,000 "best French calfskins"—the former at 80 and the latter at 65 cents per pound.

The defendants' original offer had been to buy 20,000 "Paris and Lyons city trimmed skins" and 20,000 "Paris and Lyons cities with heads and short shanks." The contract for 20,000, as has just been stated, was for "Paris and best French trimmed" and "best French." The telegrams relating to the second 20,000 contain no descriptions; but a letter written by Mr. Bonisteel on the 6th April, confirming his telegram of the same date, speaks of the more expensive skins as "Paris city trimmed calfskins." The confirmation of the sale sent by the plaintiffs to the defendants for signature but not signed speaks of "Paris and best French trimmed calfskins" and "best French calfskins."

The May contract is for "Paris and best French trimmed calfskins."

The defendants' offer of the 26th May (the "June" contract) is to pay 65 cents a pound for "Paris trimmed." The acceptance uses the same description, but a confirmation sent from New York for signature refers to "Paris and best French trimmed calfskins." Mr. Bonisteel in his letter of the 7th June, repudiating liability on the ground that his offer had been conditional, repeats this expression and does not suggest that his offer was for "Paris" skins only.

No witness can tell where any skin shipped by the plaintiffs from France was taken off; but I think it can be inferred from the quality of the skins that they came from Paris or one of the "best cities," and not from the country or from one of the cities not entitled to rank among the best. I think also that it is fairly apparent, taking the evidence with the course of dealing and the correspondence—what is omitted from the letters as well as what is said in them—that the various descriptions of the trimmed skins—"Paris and best French," "Paris and Lyons cities," "Paris trimmed"—all mean, in effect, "skins taken off in the abattoirs of Paris and/or another or others of the cities of the 'best' class." I think that so far as origin is concerned the plaintiffs ought fairly to be found to have proved that the skins in question conformed to the contractual requirements.

The quality of the skins is attacked—a great effort is made to prove that they were salt-stained and otherwise defective. If the

skins answered the description in the contract I take it that in order to establish this defence the defendants would have to shew the existence of defects so serious as to render the skins unfit for the purpose for which they were sold—"seconds" if any were to be paid for at a reduced price—and this, I think, they have utterly failed to do. The main effort was to shew salt-stains and an excessive amount of butcher-scarring. There were some inspections of the skins in the warehouse in which they were stored in New York. These did not establish the existence of salt-stains—indeed the stains would not easily be detected on such examinations as were made in New York—and I do not think they established other defects. There were also examinations by the defendants on their own premises of skins that they took in and paid for and used, and that may reasonably be supposed to have been similar to those in respect of which the action is brought; and there were attempts to get representatives of the plaintiffs (Mr. Cahn and others) to admit that these skins were defective. No such admissions were made. On the contrary, Mr. Bonisteel was told that he was dishonest in his allegations of defects, and it is said that he did not deny the accusation. I do not believe that there was any substantial ground for contending that these skins were not such as the defendants were bound to accept. There is an attempt to prove that some skins sold by the plaintiffs to the Trostel company, after the defendants had refused to accept them, were badly salt-stained and were otherwise defective. No finding as to the existence of defects can safely be made on the evidence of the witness in the employ of the Trostel company called at the trial; and as for the allowances made to the Trostel company, I think the truth is as Mr. Cahn asserts that the Trostel company took advantage of the falling market to extort from the plaintiffs some concessions to which they were not entitled. The defendants suggest also that in a memorandum signed by the parties at Toronto on the 16th June, and in another prepared by the plaintiffs in New York on the 24th August, which Mr. Bonisteel refused to sign, there are admissions that the skins were defective; but, as a matter of fact, the documents evidence merely certain allowances that the plaintiffs were willing to make if the defendants fulfilled their contracts and took in and paid for all the skins shipped from France. The transactions between the parties had been extensive and mutually satisfactory; the plaintiffs had the skins on hand, and no market at nearly the price that the defendants had agreed to pay was available; it was very doubtful whether the defendants were able to pay for the skins at the contract prices.

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their market for leather being what it was; and, whether they could pay or not, it was fair and businesslike on the part of the plaintiffs to give them some extra time and to share the loss with them. This was the purpose of the arrangements made in June and August; and the allowances conditionally, and only conditionally, agreed upon in respect of earlier shipments and of the goods still to be delivered cannot be treated as admissions of defects either in the goods theretofore delivered or in those still to be delivered. This is made quite clear by Mr. Cahn in his evidence, and his statement is corroborated by the letter written by Mr. Bonisteel to the plaintiffs at their Paris office on the 14th June, two days before the first memorandum was signed. On the whole of the evidence I am satisfied that apart from the fact next to be discussed the skins answered the descriptions contained in the contracts.

Whenever the defendants bought calfskins from the plaintiffs one of the stipulations was that the trimmed skins should weigh not less than seven pounds (except in one case in which the limit was six pounds) nor more than fifteen pounds, and that their average weight should be about ten or eleven pounds; and in case of the skins with heads and short shanks the weights were to be from eight to fifteen pounds, and the average the same as in the case of the trimmed skins. The weight of a skin is a matter of some importance to a tanner, and Mr. Cahn says that Mr. Bonisteel stated on one occasion that he had made a mistake in not naming twelve pounds instead of fifteen as a maximum. After the defendants had refused finally and definitely in October, 1920, to take in any of the skins in question, the plaintiffs sold the trimmed skins in January, 1921—those weighing from twelve to fifteen pounds to the Monarch Leather Company of Chicago, and those “weighing 12 lbs. and down” to Albert Trostel & Sons Co. of Milwaukee. The untrimmed skins were sent back to France and sold there. The fact that the heavy skins had been sold to the Monarch company and the light to the Trostels made it necessary to undo the bundles (skins come tied some six or eight in a bundle) and to weigh each skin. On the weighing it was found that there were 8,020 skins weighing over twelve pounds each and that of these 714 were over sixteen pounds, running up to twenty pounds in some instances; and a witness says, and it seems probable, that of the remainder of the 8,020 a good many weighed between fifteen and sixteen pounds. The witness said that approximately there were as many skins of any given weight as of any other; and it is suggested by counsel that from this evidence one

can ascertain the number that there were over the fifteen pounds which was the limit in the defendants' case but not exceeding the sixteen pounds which was the limit on the sale to the Trostel company. This would be to take the evidence rather too literally. It may, however, be assumed that the number of those that weighed over fifteen pounds each was considerably in excess of 714; and it may and ought to be found that the skins weighing over fifteen pounds were distributed throughout the various consignments.

Mr. Cahn says that in normal circumstances no buyer would think of declining to receive a shipment of skins merely because three in a hundred exceeded the contract weight—a shipment, he says, of which no more than three per cent. of the skins were overweight would be considered very good delivery. But there is no evidence upon which it could be found that there is a trade custom which entitles the seller to deliver any skins that exceed the weight set by a contract like the contracts between the plaintiffs and the defendants; moreover, if it is in any sense a question of percentages, it is to be noted that when the skins weighing more than fifteen but not more than sixteen pounds are taken into account the percentage of "heavies" in this case is probably five or six rather than three.

In the absence of some custom entitling the plaintiffs to deliver some skins exceeding fifteen pounds in weight, the fact that a considerable number of such skins were mixed in with the others in the bundles that the defendants refused to take in seems to me to be fatal to the plaintiffs' case. To adapt the language of Willes, J., in *Lery v. Green* (1859), 1 El. & El. 969, 117 R.R. 552, the plaintiffs cannot support an averment that they were ready and willing and offered to deliver the goods ordered: they can only aver that they offered to deliver part of those goods, together with certain others. Such an averment is bad in substance. The law seems to have been before what it is declared by sec. 30 (3) of the Sale of Goods Act, 1920 (10 & 11 Geo. V. ch. 40), to be, viz.: if the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods that are in accordance with the contract and reject the rest, or he may reject the whole. The defendants here did not reject on this ground, indeed they did not know it was open; nevertheless, now that the question is whether they were bound to take the goods that the plaintiffs had in New York, they are entitled to set up the admixture of goods of a description different from that contained in the contract with some goods such as the contract called for. Of the skins that the

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plaintiffs had on hand in New York the larger portion were skins that the defendants would have been bound to accept if they had been tendered unmixed with others; but the defendants were under no obligation to take into their warehouse bundles containing those skins and others of a different description and to cull out and set aside for the plaintiffs or return such skins as did not conform to the specifications. For this reason, in my opinion, the action fails.

The counterclaim is made up of a considerable number of items, some small and some large, in respect of shipments taken in by the defendants and paid for. There are included claims for "shortages," i.e., claims that fewer skins were delivered than the invoices called for; claims in respect of excess of salt, which made the apparent weight of the skins paid for greater than the real weight (including such salt as there ought to have been); claims that horsehides and cowhides had been delivered and had been paid for by the defendants as calfskins; claims that skins with long shanks had been delivered and had been paid for on the assumption on the part of the defendants that they were trimmed skins; a similar claim in respect of skins with heads; claims for butcher-scarred and salt-stained skins. These claims are stated in detail in a memorandum furnished by Mr. Bain as part of his argument.

With exceptions in respect of a claim for "shrinkages," represented by credit-notes issued by the plaintiffs, and an allowance in respect of salt-stains, made in Paris and evidenced by an invoice, these claims, in my opinion, fail for want of proof, and there is no need to consider Mr. Robertson's point that in any case they are barred by a clause of the contracts under which, presumably, the skins were delivered, reading: "No claim under this contract can be recognised, unless made within 10 days after . . . arrival." And the two claims that are proved are to a large extent offset by a contra account recognised by the defendants and set forth on p. 5 of Mr. Bain's memorandum. The balance in favour of the defendants is \$3,446.33. For that amount they ought to have judgment.

One of the large items is a claim for a shortage of 453 skins shipped in April, 1920. Lloyd's agents were called in after the bundles had been opened, so that their certificate might be used in the prosecution of a claim against the insurers; and after counting the skins exhibited to them these agents certified that the shortage existed, and their certificate was given to the plaintiffs, who took the matter up with the insurers but without result. There is no

reason that I can see for charging the plaintiffs with this shortage—no reason for supposing that they, rather than the carriers, were responsible for it. The sales were “c.i.f. New York.” The defendants’ evidence is that the skins were shipped from New York. They suggest that there was a loss in transit.

Another large item is a claim for excess of salt in a shipment invoiced on the 27th April, 1920. There is no evidence in support of it—merely a statement by Mr. Bonisteel based entirely on hearsay.

The same remark as to the absence of evidence applies to a number of claims in respect of horsehides and cowhides, and to some claims for heads, and for poor quality, long shanks, etc., making up the remainder of pp. 1 to 4 of Mr. Bain’s memorandum (items 3 to 20 inclusive); also to a claim in respect of cowhides and to a large claim in respect of long shanks and butcher-scars, set out on p. 7 (items 40 and 41). It does not apply to the claims on p. 6 (items 37 to 39), which are in respect of butcher-scars, salt-stains, and heads and long shanks: there is evidence in support of these, but in my opinion it is not to be accepted. The credit-notes dated the 5th August, 1920, prepared by the plaintiffs but not issued to the defendants, are, in my opinion, no evidence that the defendants are entitled to the credits mentioned in them. My reason for thinking that the evidence furnished by the defendants in support of their claims in respect of defective skins is not to be accepted, and for not treating credit-notes as admissions, will appear from what is about to be said as to the negotiations that took place.

As has been mentioned, Mr. Bonisteel was in England and on the continent in April and May, and returned to Aurora in June. By the time of his return the market had gone badly against the defendants, and there was doubt as to their ability to carry out their contracts with the plaintiffs, even if they tried to do so. In these circumstances, Mr. Cahn and Mr. Bonisteel made the arrangement of the 16th June, by which, “in order that all existing contracts between” the parties might be filled, certain allowances were to be made. Up to this time—indeed, as Bonisteel himself says, up to the 22nd July—such complaints as there had been in respect of skins delivered were the occasional complaints that are to be expected, such as that a horsehide has found its way into a shipment, or that some skins have been shipped with long shanks (see, e.g., the letters of the 8th June). Complaints like these (if they are properly to be called complaints) had been few and far between, and where made had been adjusted without difficulty:

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and the arrangement of the 16th June was not an adjustment of complaints—it was an arrangement for the sharing of losses. By it, the defendants were to take in within six weeks and pay for large shipments invoiced on the 29th April—in all some 50,000 skins—and within three months all the other shipments. However, the market became no better, the defendants had no immediate need of skins even at the reduced prices, and shipping instructions were not sent. The plaintiffs then began to press Mr. Bonisteel to live up to his contract—see, e.g., their letter of the 20th July—and it became necessary for the defendants to do something. Accordingly, Mr. Bonisteel went to New York, where he had an interview with the plaintiffs on or about the 21st July. At this interview claims in respect of quality were put forward. Bonisteel telephoned to Aurora for a l.st, which was sent in a letter dated the 22nd July. Bonisteel had left New York before this letter was delivered to the plaintiffs. After his return to Aurora he added to the list the two large claims numbered 37 and 38 in Mr. Bain's memorandum. The first of these (which is the largest of all the claims made) is in respect of skins invoiced on the 23rd March, on which the defendants, as Bonisteel himself says, had been working for three weeks before the meeting of the 21st July. On receipt of these new claims the plaintiffs suggested a meeting, and it was arranged that Bonisteel should go to New York. Before going he put forth, in a letter of the 30th July, another large claim in respect of heads and long shanks (Mr. Bain's No. 30). The meeting took place on or about the 2nd August. All the claims in the list of the 22nd July and in the letters of the 26th and 30th July were discussed, and the plaintiffs announced a readiness to make, conditionally, the allowances represented by the credit-notes of the 5th August; but no definite arrangement was made—certainly there was no such agreement as is set forth in a letter of the 3rd August written by Mr. Bonisteel upon his return to Aurora. There was, however, a direction to send on one lot of 665 bundles of skins, part of the shipment of the 29th April mentioned in the agreement of the 16th June. These skins were got ready for shipment, but the defendants instructed the plaintiffs to hold them.

Mr. C. E. Weil (who had come from Paris to deal with the difficulties that had arisen) and Mr. Cahn were in Aurora on or about the 18th August. On that occasion some skins—I think some of those referred to in the letters of the 26th July—were exhibited, and Bonisteel endeavoured to get the plaintiffs' representatives to admit that the butcher-scars mentioned were to be



seen. All French calfskins are butcher-scarred. If the scars are of a certain depth, and a certain distance from the edge of the skin, the skin becomes a "second," and under the agreements between the plaintiffs and the defendants would be paid for at a reduced price. Bonisteel's effort, however, was not to have these skins classed as "seconds;" apparently he claimed, as it is claimed now, that they were so badly scarred as to be unmerchantable. The plaintiffs' representatives would not admit that the scarring was excessive and I do not believe that it was.

On the 24th August, Bonisteel was in New York. This time, an agreement was reached. The skins were to be shipped within a reasonable time; the plaintiffs were to make large allowances additional to those of the 16th June; the allowances were to take the form of cheques which the plaintiffs were to issue in favour of the bankers who held the Paris drafts for collection—as each shipment went forward there was to be sent to the bankers a cheque for an amount bearing the same ratio to the total of the allowances as the price of the shipment bore to the price of all the shipments undelivered on the 24th August. Mr. Cahn prepared a memorandum of this agreement, but Mr. Bonisteel gave a reason why he could not sign it at the time. It was agreed that the 665 bundle lot should go forward at once. It went forward, and in respect of it the plaintiffs adhered to the agreement of the 24th August (see exhibit 9).

After the 665 bundles had been received complaints were made of the quality of the skins contained in them, and C. E. Weil and the witness Meyer went to Aurora. They would not admit that such skins as were exhibited to them were open to the criticism that Bonisteel made of them. Meyer's account of the interview and his statement as to the appearance of such skins as he looked at may, I think, be accepted. Bonisteel was told that he would have to pay for the skins that had been delivered and take in those that then remained in New York, and he authorised the plaintiffs to send forward another lot of 784 bundles. Weil or Meyer telegraphed for this lot, and it was sent on, the plaintiffs again following the course stipulated at the meeting of the 24th August (see exhibit 10). The skins were taken in and paid for, but the defendants say that they are as bad as those contained in the 665 bundles.

It is unnecessary to discuss the evidence as to Mr. Bonisteel's later visit to New York, the examination of the skins in warehouse there, the defendants' final repudiation of liability, and the other matters that were gone into at the trial. It suffices to say

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that the net result of it is that I am left with the belief that the defendants' complaints are to be attributed rather to the state of the market than to the condition of the skins; and, just as I thought that (except on the question of weight) the defendants had failed in their effort to shew that the skins undelivered were skins that they were not bound to accept, so also I think that the complaints upon which the counterclaim is founded are not to be taken to be established except in so far as they are admitted. The credit-notes dated the 5th August were prepared in anticipation of the defendants taking delivery of the skins that then remained undelivered, and in some instances sending back to the plaintiffs skins in respect of which the defendants were to have credit for the total price. They represent concessions that the plaintiffs were willing to make in the circumstances that had arisen. I do not believe that they are evidence of an admission by the plaintiffs that the defendants had established any of the claims. If in the 665 or the 784 bundles there were skins that ought to have been classed as seconds, the claim for the reduction in price provided for by the contracts is more than satisfied by the allowances set forth in exhibits 9 and 10. If there were similar skins in any earlier shipments, no doubt the reduction contracted for would have been made if the matter had been brought to the attention of the plaintiffs in the usual way and at the proper time; but, whether that is so or not, there is no such proof of the defects as warrants the making of any allowance in this action.

For these reasons the counterclaim will be dismissed except as to the amount of \$3,446.33 already mentioned.

The action will be dismissed with costs. There will be no order as to the costs of the counterclaim, the recovery being merely in respect of items about which there was no serious dispute.

The plaintiffs appealed from the judgment of ROSE, J.

October 15 and 16, 1925. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN J.J.A.

*Wallace Nesbitt, K.C., R. S. Robertson, K.C., and G. M. Huycke*, for the appellants, argued that the learned trial Judge erred in holding that the plaintiffs were not entitled to judgment because of the alleged overweight of a certain number of skins—he should have held that the defendants, in breach of their contracts, had refused to pay for the skins. These contracts were contracts by description in the sense of quality only, and the differences in quality were immaterial. Counsel urged that the property in the goods had passed to the defendants. They had

accepted the goods, and so had waived any right to object to their condition: *Hardy & Co. v. Hillerns and Fowler*, [1923] 2 K.B. 490; *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, [1911] A.C. 394; *Hartley v. Hyman*, [1920] 3 K.B. 475. The defendants, having accepted previous shipments of similar goods, were barred from objecting later to other goods: *Granger Co. v. Universal Machinery Corporation Ltd.* (1920), 193 App. Div. (N.Y.) 234; *Keswick v. Rafter* (1898), 35 App. Div. (N.Y.) 508; *Littlejohn v. Shaw* (1899), 159 N.Y. 188; *Hess v. Kaufherr* (1908), 128 App. Div. (N.Y.) 526. Counsel also contended that the defendants had been guilty of unreasonable delay in inspecting the skins. They also urged that the description of the skins as being between certain weights was a warranty, and not a condition: *Harrison v. Knowles & Foster*, [1917] 2 K.B. 606, at p. 610; *Beck & Co. v. Szymanowski & Co.*, [1924] A.C. 43. The learned Judge also erred in finding that there was any evidence to support the counterclaim.

*J. W. Bain*, K.C., and *M. L. Gordon*, for the defendants, respondents, contended that many of the objections to quality in the condition of the skins, such as, for example, the presence of salt-stains, were material; but, in any event, the learned trial Judge was correct in finding that the appellants could not recover owing to the overweight of many of the skins: *Levy v. Green*, 1 El. & El. 969; sec. 30 (3) of the Sale of Goods Act, 1920, 10 & 11 Geo. V. ch. 40. Counsel also contended that the property in the goods had never passed: *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18; *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. 214; *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.*, [1916] 1 K.B. 495; Gibb's Sale of Goods on C.I.F. and F.O.B. Terms, p. 30, and cases there cited. The American cases cited on behalf of the appellants on the question of waiving rights to object are not authorities in Ontario. There had been no unreasonable delay, in the circumstances of the case, in inspecting the skins. The description of the skins as being between certain weights was a condition, and not a warranty: *Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394. Upon the counterclaim judgment should have been given for the full amount asked.

*Robertson*, K.C., in reply, argued that, as to inspection, either the respondents, by their manner of dealing, waived the right to inspect, or there was a reasonable opportunity afforded to inspect, which had not been taken advantage of.

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October 30. The judgment of the Court was read by RIDDELL, J.A.:—This is an appeal by the plaintiffs from a judgment of Mr. Justice Rose, after a trial without a jury at Toronto. The evidence was of great length and included an impressive mass of exhibits. Before us the matter took a wide range, and every argument was urged for two days with skill and earnestness by able counsel on both sides.

The case is an important one, involving a large sum of money, and no complaint can fairly be made of the time expended in developing it.

I have read the voluminous (I must say, not always luminous) evidence, including the nearly 450 pages of exhibits: and am satisfied that the salient and governing facts are as found at the trial. The learned Judge has given reasons for his judgment which are clear, particular, and exhaustive—he has also given his view of the credibility of the principal witnesses on either side, which is of material advantage to us in disposing of the appeal.

We must approach the consideration of the case with the very great advantage of knowing from the trial Judge the relative credit to be given to the chief witnesses on either side. It is, in my view, of cardinal importance that an appellate court should not from an examination of the dry bones of a trial, which is all that the stenographer's report can possibly afford, attempt to weigh the credit to be given to witnesses where the trial Judge has expressed his view, derived from a consideration of their conduct and demeanour in the witness-box.

Nor is the case of *Curtis Brothers v. Hayes* (1923), 24 O.W.N. 193, to be considered as deciding that the trial Judge must state that his view of the credibility of witnesses depended upon "the manner in which the testimony of the witnesses was given or . . . their demeanour," or an appellate court will consider itself "in as good a position as that learned Judge to weigh the evidence and determine what effect should be given to it." It may be wise for the trial Judge so to state—opinions differ as to that—but I can see no reason for requiring such a statement from the trial Judge where it is obvious that he must have formed his opinion of credibility in that way.

There may, indeed, be, and there have been, cases in which inexpugnable documents, etc., prove that the trial Judge was mistaken; but these are very few; and nothing of the kind appears here.

The facts, shortly stated, are that the plaintiffs are a firm in Paris, France, engaged in the sale of calfskins; they have a branch



in New York, managed by the witness Cahn; the defendants are tanners in Aurora, whose business is managed by the witness Bonisteel. The parties had had many dealings with each other before the contracts which are the subject-matter of this action were entered into.

In the months of March, April, May, and June, 1920, respectively, were entered into the four contracts—we may leave aside the preliminary negotiations, not always clear, and take the contracts as they read.

The contracts all being c.i.f. New York, the 'skins should, strictly speaking, have been taken over by the defendants at New York; but for the convenience of the defendants, whose tannery was in Aurora, Ontario, the New York office of the plaintiffs was in the habit of looking after the transportation for Aurora. This was a gratuitous service, no doubt to secure the goodwill and future trade of a valued customer; by no stretch of the imagination could it be considered, and it was not in fact treated, as an agency to accept goods as filling the contracts; the defendants claimed rebates from time to time and had the claims allowed without question.

In June the defendants, alleging that the skins which were being sent forward were unsatisfactory, refused to accept any more. Thereupon there was a meeting of Cahn and Bonisteel which resulted in an arrangement, exhibit 7. This arrangement dealt with rebates and allowances and need not be further considered, being conditioned on the defendants accepting all the skins. The parties then are "as you were," and we must look to the original contracts for the determination of their rights. After the arrangement in June, there were further shipments and further complaints; at length, on the 24th August, there was another meeting and another contract (exhibit 8). This was not signed by Bonisteel, because, as he said, his bank did not allow him "to sign any statement—any contract," but nevertheless it was so agreed. Nothing in this contract is of importance in the decision of this case. Thereafter there were more shipments and more complaints, and ultimately, in October, Bonisteel went to New York, examined the skins there stored to fill his contracts, and definitely refused to accept them, as they were "not of the right quality."

The New York office, after holding the skins for a time, sold for the best price available, and brought this action; the defendants counterclaimed; and the learned trial Judge has given judgment for the defendants in both action and counterclaim.

The March contract is for the sale of "abt. 10,000 g.s. Par's

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App. Div. and best French trimmed calfskins 7/15 lbs. averaging about 10½/11 lbs. . . . abt. 10,000 best French calfskins 8/15 lbs. averaging abt. 10½/11 lbs. . . . all c.i.f. New York . . . in no case can the goods be left for seller's account." "Seconds, if any, at usual reductions." "Paris and best French skins" means skins taken off in the abattoirs in the cities of France; "trimmed" means deprived of heads and shanks; "g.s." means green salted; "seconds" are hides with cut or hole, badly scored or with grain damage, the hair badly roughed, etc.; and the "usual reductions" are 10 cents per skin up to 10 lbs.; 12½ cents up to 12 lbs.; 15 cents up to 15 lbs.

What is known as the "April contract" is for the sale of "abt. 10,000 g.s. Paris and best French trimmed calfskins 7/15 lbs., averaging abt. 10½/11 lbs.; abt. 10,000 best French calfskins, 8/15 lbs., averaging about 10½/11 . . .," with the same terms as in the March contract.

The May contract is for "about 5,000 g.s. Paris and best French trimmed calfskins 7/16 . . .," and the fourth, that of June, for "abt. 10,000 g.s. Paris and best French trimmed calfskins 7/16 lbs. . . ."

Most of the complaints were based upon supposed or alleged defects in the skins themselves, so that they would not answer the description "Paris and best French trimmed calfskins."

I agree with the learned trial Judge that there was no foundation for the allegation—there was an occasional horsehide or cowhide which got into shipments by mistake, but every one recognised that it was by mistake. It is possible, too, that an occasional skin here and there was not up to the name, but that always happens. The skins fully answered the description, except in one particular, that is, the weight.

All the contracts were c.i.f. New York—it is not necessary to consider on principle the rights of the parties to such contracts, the very exhaustive discussion in the English Courts leaves nothing in that respect to be desired. *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18, *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. 214, 934, *Happe v. Manasseh* (1915), 84 L.J. K.B. 1895, *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.*, [1916] 1 K.B. 495, *Ireland v. Livingston* (1872), L.R. 5 H.L. 395, at pp. 406-7, *Crozier Stephens & Co. v. Auerbach*, [1908] 2 K.B. 161, *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K.B. 198, 24 Com. Ca. 89, *Hardy & Co. v. Hillerns and Fowler*, [1923] 2 K.B. 490, perhaps contain all that can be asked. The c.i.f. contract in any case does not differ from any other con-

tract in certain requirements, one of which is the necessity of goods answering the description in the contract, "appropriate goods," to use the terminology of McCardie, J., in the *Manbre* case, [1919] 1 K.B. at p. 203. As said by Vaughan Williams, L.J., in the *Crozier* case, [1908] 2 K.B. at p. 164, "There can be no doubt that, if the goods were in fact not in accord with the contract, there was a breach of the contract . . . There is ample authority to shew that this is the law . . ." Or by Hamilton, J., in *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. at p. 220, "goods of the description contained in the contract."

Nor does the fact that previous shipments of similar goods were accepted and the goods used by the defendants, with a claim for defects, bar them from raising an objection later to other goods: *Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K.B. 937.

Some New York cases holding that where tendered goods are rejected on specific grounds, all other objections are thereby waived, were cited to us: *Granger v. Universal Machinery Corporation Ltd.*, 193 App. Div. (N.Y.) 234; *Keswick v. Rafter*, 35 App. Div. (N.Y.) 508; *Littlejohn v. Shaw*, 159 N.Y. 188; *Hess v. Kaufherr*, 128 App. Div. (N.Y.) 526. That is not our law. "It is clear, of course, that the plaintiffs are not, by their rejection of the tender on an insufficient ground, precluded from supporting the rejection on other and valid grounds:" *per* McCardie, J., in the *Manbre* case, [1919] 1 K.B. at p. 204. This may be unimportant, as, in any case, "not of the right quality" is broad enough to cover the defect upon which the learned trial Judge founds the right of the defendants to reject the skins.

Much argument was directed to the unreasonable delay in inspecting the skins; and, no doubt, the inspection should be in a reasonable time, having regard to all the circumstances of the case. But at the same time it can be fairly retorted that the plaintiffs themselves did not entitle themselves to recover on the strict reading of a c.i.f. contract.

No better description of what is necessary to entitle a vendor to recover on a c.i.f. contract can be found than in the judgment of Hamilton, J., in *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. 214, at p. 220:—

"A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an

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App. Div. insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn, J., in *Ireland v. Livingston* or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage."

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Strictly speaking a contract of insurance should have been tendered to the defendants: the *Manbre* case, [1919] 1 K.B. 198; *Biddell Brothers v. E. Clemens Horst Co.*, *ut supra*; and that an actual policy, not a broker's note, etc.: *Wilson Holgate & Co. v. Belgian Grain and Produce Co.*, [1920] 2 K.B. 1; *Diamond Alkali Export Corporation v. Fl. Bourgeois*, [1921] 3 K.B. 443; *Donald H. Scott & Co. Ltd. v. Barclays Bank Ltd.*, [1923] 2 K.B. 1; and it is no answer to say that the goods arrived safely: *Orient Co. Ltd. v. Brekke & Howlid*, [1913] 1 K.B. 531.

Then, too, documents of title should, in strictness have been tendered. If the New York office received the skins from ship-board and held them as and for the defendants, and the defendants had at all times the power, *in invitum* the plaintiffs, to take possession of the goods, no doubt the tender or delivery of documents of title would be considered waived.

That is not what was done in respect of the goods now refused. The witness Cahn says, in reference to the goods not shipped by the 16th June: "Mr. Bonisteel volunteered to take these skins to his warehouse and keep them separate until such time that he could pay for them; but, in view of the fact that he told me that he was not getting any money from the bank and his agitated condition, I thought that he was not any good any more, and I refused to ship the skins, and rather stored them in New York. I told him I had stored them in New York, and then the dispute arose who was going to pay the warehouse charges, and I told him then that I would not even consider the matter . . ."

This was a distinct assertion of property in the skins and as distinct a refusal to allow the defendants to have them till they could pay for them or to own them in the meantime.

Even to inspect the skins, Bonisteel had to ask Cahn's permission.

The plaintiffs asserting title in the goods and the defendants acquiescing, it should, on principle, perhaps be considered that the plaintiffs themselves put an end to the contract.

Assuming, however, that the contract—be it always remembered, a c.i.f. contract—continued to subsist, all this conduct was

a waiver by the plaintiffs of any right they might have to have the skins accepted or rejected speedily—and at the worst for the defendants, even if Lord Justice Atkin is not right in *Hardy & Co. v. Hillerns and Fowler*, [1923] 2 K.B. at p. 499, when he disapproves the view that the property passes under a c.i.f. contract when the purchaser has had a reasonable opportunity of ascertaining whether the goods are in conformity with the contract, that vesting must be subject to a reversion when the buyer exercises his right of rejection.

From the whole course of dealing between the parties, it is, I think, clear that the defendants did not lose their *primâ facie* right by October to reject the skins, if in fact they did not answer the contract, and that they are entitled to set up here the defect found by the trial Judge.

I agree with the finding that a substantial proportion—for *de minimis non curat lex*—of the skins in the lots offered to the defendants was overweight, and that that is a matter of considerable importance to a tanner. Cahn himself says that a buyer if given a skin that was overweight would have the right to reject it, “if he wanted to be exactly within the terms of the contract.”

The property not having passed, the real question to be decided is, whether the description of the skins as being between certain weights is a condition or a warranty.

It is not always easy to determine whether a statement concerning goods sold is a condition or a warranty. There are extreme cases, as, for example, Lord Buckmaster’s well known “peas and beans” (*Beck & Co. v. Szymanowski & Co.*, [1924] A.C. 43); “common English sainfoin” (*Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394); “Skirving’s Swedes” (*Allan v. Lake* (1852), 18 Q.B. 560); etc., etc. But other cases are not so simple, and there has been much difference of judicial opinion, many definitions have been given, e.g., *Harrison v. Knowles & Foster*, [1917] 2 K.B. at p. 610, and cases cited.

We need, I think, go no further than our own Sale of Goods Act, 1920, which codifies and expresses the existing law. Section 2 (n): A warranty is “an agreement with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.”

As said by Lord Alverstone, C.J., in *Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394, at p. 397: “Could it be fairly suggested that a claim to deliver goods which were not in accord-

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Skins above the contract weight are no more within the contract than spools of thread of 180 yards were within the description "200 yard reels;" *Beck & Co. v. Szymanowski & Co.*, [1924] A.C. 43; or canned fruit in cases containing 24 tins were within the description fruit "in cases containing 30 tins each." It is quite as futile to say that the skins, though overweight, were of the same quality as though within the contract weights, as it was in the English cases cited to say that the thread was as good on the 180 yard spools as if they had been 200, or that the fruit was of the quality expected though packed in a different way.

I think the defendants within their rights in declining to accept any skins outside the specified weights. The learned trial Judge has correctly applied the law now codified in the Sale of Goods Act, 1920, sec. 30 (3): "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

Section 30 (4) does not apply: there is no custom of the trade or special agreement proved, and the transactions between the parties do not establish a "course of dealing" preventing the application of sec. 30(3): the *Manbre* case, [1919] 1 K.B. at p. 206.

The main appeal should be dismissed with costs.

As to the counterclaim, I have had considerable difficulty in arriving at the facts; but a careful consideration of the evidence fails to convince me that my learned brother's conclusions are wrong.

The appeal as to the counterclaim should also be dismissed with costs.

*Appeal dismissed with costs.*



[ROSE, J.]

## TORONTO GENERAL TRUSTS CORPORATION V. ROSENFELD.

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Oct. 31.

*Judgment—Motion to Set aside—“Judgment by Default”—Rule 520—Inherent Jurisdiction—Judgment Pronounced in Court upon Motion in Default of Defence.*

Rule 520 confers jurisdiction to set aside in Chambers a “judgment by default,” but its application is confined to judgments which, upon default, are entered without any motion

But, apart from that Rule, the Court (i.e., a Judge in Court) has jurisdiction, upon motion, to set aside a judgment by default pronounced upon motion for judgment by a Judge sitting in Court.

MOTION by the defendants to set aside a judgment which LENNOX, J., sitting in Court, directed to be entered for default of defence.

October 29. The motion was heard by ROSE, J., in the Weekly Court, Toronto.

*R. W. R. Shearer*, for the defendant Rosenfield.

*G. Keogh*, for the defendant the Porcupine Mutual Gold Mines Ltd.

*G. P. Campbell*, for the plaintiffs.

October 31. ROSE, J.:—It is quite clear that the default was due not to any intention of the defendant Rosenfield, who is the principal defendant, to let the case go by default, but to a confusion which arose by reason of two solicitors being consulted and neither understanding that he was charged with the duty of entering the appearance and delivering a statement of defence within the time limited.

Judgment on the motion, however, was reserved because the applicants based their case upon Rule 520, which confers jurisdiction to set aside in Chambers any “judgment by default,” and I was in doubt as to whether that Rule conferred authority to set aside a judgment pronounced by a Judge upon motion.

Upon consideration and upon consultation with some of my brother Judges, I am of opinion that the judgment in question is not a “judgment by default” within the meaning of the Rule, and that so far as the Rule goes I am without jurisdiction. But I think also that the Court, apart altogether from the Rule, has jurisdiction to set aside such a judgment, and that the Rule was passed for the purpose merely of conferring jurisdiction in Cham-

Rose, J.      bers to set aside those judgments which, upon default, are entered  
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Therefore, as the motion was made to me sitting in Court, I exercise the jurisdiction I possess as a Judge in Court, and I set aside the judgment.

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Before the application to Mr. Justice Lennox, an order had been made continuing until the trial an injunction against dealing with the property in question. That order will, of course, remain in force.

The costs of the present motion will be reserved to be disposed of by the Judge presiding at the trial, or if there is no trial by a Judge upon motion.

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[APPELLATE DIVISION.]

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RE McCLENNAN.

Nov. 2.

*Will—Construction—Gift to Wife of Property to be Used to Support herself and Educate three Children—Property “Existent” at Death of Wife to be Applied in Way Mentioned in Certain Event—Whether Widow Took Absolute Estate or Life-interest only—Residuary Gift to Wife—Gift by Implication to Children.*

The testator (para. 3 of his will) gave and bequeathed all his “real and personal estate except my library to my wife to be used by her to support herself and to educate my three children,” naming three of his six children. “4. I desire that after her death should any of the said real and personal estate be still existent . . . in case any of my children shall be an invalid . . . one-half of said estate then existing at the time of the death of my said wife shall become the property of the said invalid and should it so happen that none of my children are sickly at the time of the death of my wife but that one or more of my said children are less than twenty-one years of age I direct that the said child or children shall receive twice as much of said estate as the child or each of the children that has attained the age of twenty-one years.” By para. 5 the testator disposed of his library. “6. All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my said wife.” The testator died in 1895, the widow in 1913; at the date of her death the executors of the testator had assets of his estate undisposed of to the value of more than \$5,000. At her death none of the children were invalids or under the age of twenty-one:—

*Held*, by LOGIE, J., in the Weekly Court, that para. 3 should be interpreted to mean that the testator gave his property to his wife absolutely to enable her to use it to support herself and educate the children, and that para. 4 contained an inconsistent gift over, which was therefore inoperative and void.

*Held*, on appeal, by the majority of the Court, that the judgment should be affirmed.

*Per* MULOCK, C.J.O., and MAGEE, J.A.:—The widow took only such an interest as she might *use* for the purposes named. She having died without leaving an invalid or infant child, the event upon the happening of which his children were to take did not happen, and they took nothing under the will. Under para. 6, the widow took whatever portion of the estate was still existent.

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*Per* HODGINS, J.A.:—Under para. 3, the widow took an absolute estate but charged with the education of the three named children. In this view, clause 4 was repugnant and inoperative. But, if this was not the proper interpretation, and the will was to be construed as meaning that any part of the estate unused for the purposes specified was to be dealt with under clause 4, then the wife's estate took it as part of the residue specially given to her. There was nothing in the will giving any estate to the children who were over twenty-one, and there was no foundation for an implied estate—the inference must be necessary, irresistible, and derived from the context of the whole will.

*Barnet v. Barnet* (1861), 29 Beav. 239, 244, and *Fitzhenry v. Bonner* (1853), 2 Drew. 36, 40, referred to.

*Per* FERGUSON, J.A. (dissenting):—The wife took a life-interest in the property, with an implied contingent power to encroach on the capital for the purposes of her maintenance and the education of the three children named; and so much of the property as was not so used by her during her life should go to the persons expressly or impliedly named in para. 4. The residuary clause operated only on such of the property as was not disposed of by the preceding paragraphs. In order to give effect to the provisions of para. 4 in favour of infant children or of an invalid child it was necessary to imply a gift to his adult children or to his children generally. There being no invalid or infant child, the property of the testator still in the hands of his executors should be divided among all his children equally.

*Parker v. Tootal* (1865), 11 H.L.C. 143, 161, applied.

AN appeal by the children of Alexander McClelland, deceased, other than J. F. McClelland, from an order of LOGIE, J., in the Weekly Court (15th January, 1925), declaring that Kate C. McClelland, widow of the testator, took under the will absolutely the testator's real and personal estate described in para. 3 of the will, and that the directions or dispositions contained in para. 4 were void.

The will was as follows:—

"This is the last will and testament of me Alexander McClelland of the township of Sydenham in the county of Grey and Province of Ontario Presbyterian Minister made this 20th day of June in the year of our Lord one thousand eight hundred and ninety-five.

"1. I revoke all former wills or other testamentary dispositions by me at any time heretofore made and declare this only to be and contain my last will and testament.

"2. I direct all my just debts funeral and testamentary

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expenses to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after.

"3. I give and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say all the said real and personal estate except my library to my wife to be used by her to support herself and to educate my three children Katie Jessie and George.

"4. I desire that after her death should any of the said real and personal estate be still existent that in case any of my children shall be an invalid that is permanently unwell one-half of said estate then existing at the time of the death of my said wife shall become the property of the said invalid and should it so happen that none of my children are sickly at the time of the death of my wife but that one or more of my said children are less than twenty-one years of age I direct that the said child or children shall receive twice as much of said estate as the child or each of the children that has attained the age of twenty-one years.

"5. I give devise and bequeath my library to whichever of my sons shall study for the ministry and he shall receive the same when and as soon as he has entered college provided he enters college before he is twenty-five years of age provided that if more than one of my sons shall study for the ministry I direct that the library shall be divided between them in the event that none of my sons shall study for the ministry I direct that said library shall be divided equally among the children of my present wife.

"6. All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my said wife.

"And I nominate and appoint Hugh McKay and Neil McDonald to be executors of this my last will and testament."

March 10. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and FERGUSON, J.J.A.

*H. S. White*, K.C., for the appellants, contended that by para. 3 of the will the testator intended that his widow should take a life-estate only in the property, in trust for the support of herself and the education of the testator's children named, and that therefore upon the death of the widow the property vested in the persons whom the testator intended to benefit under para. 4 of the will: *Re Levy* (1924), 26 O.W.N. 300; *Lamoureux v. Craig* (1914), 49 Can. S.C.R. 305; *Mills v. Biden* (1919), 50 D.L.R. 241; *Shearer v. Hogg* (1912), 46 Can. S.C.R. 492; *Re Richer* (1919), 46 O.L.R. 367; *In re Sanford*, [1901] 1 Ch. 939, at p. 943; *Constable v. Bull* (1849), 3 DeG. & S. 411; *In re Thomson's Estate* (1880), 14 Ch. D.



263. The use of the word "direct" together with the word "desire" in para. 4 shews that the latter word should be interpreted as a word of disposition rather than as one of recommendation merely. This shews that the testator intended to dispose of the balance of his estate unused at his wife's death. So, in order to carry out the provisions of para. 4 in favour of infant children or an invalid child, a gift to his adult children or his children generally must be implied: Halsbury's Laws of England, vol. 28, p. 845. The residuary clause only operated on such of the testator's property as was not disposed of by the preceding paragraphs.

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*W. E. Buckingham*, for *J. F. McClennan*, respondent, argued that para. 3 should be interpreted to mean a gift to the testator's wife absolutely, to enable her to support herself and educate the testator's children named, and that para. 4 amounted to an inconsistent gift over, which was therefore inoperative and void. He submitted that a clear gift of an absolute interest would not be cut down by subsequent words, unless the intention so to cut down was clearly expressed: *Re Walker* (1925), 56 O.L.R. 517; Halsbury's Laws of England, vol. 28, p. 777; Theobald on Wills, 7th ed., p. 482; Jarman on Wills, 6th ed., p. 894; *In re Jones*, [1898] 1 Ch. 438, at pp. 440, 441; *Hammond v. Neame* (1818), 1 Swanst. 35; *Re Miller* (1914), 6 O.W.N. 665; *Williams v. Roberts* (1857), 27 L.J.N.S. Ch. 177. Paragraph 4 should be divided into two parts, the first expressing a mere desire or recommendation in favour of an invalid child if there were one, the second expressing a direction and disposition in favour of an infant child if there were one, both conditional on the happening of certain events which had not happened, and therefore para. 4 was, in the circumstances, inoperative, and the widow took under the residuary clause, number 6: *Re Wigle* (1924), 27 O.W.N. 357. There could be no implication of a gift to all the children equally under para. 4.

*J. F. P. Birnie*, for the executor, respondent, submitted his rights to the Court.

*White*, K.C., in reply.

November 2. *MULOCK*, C.J.O. (after setting out the will as above):—The first point to determine is whether under clause 3 the widow takes the estate absolutely or only a limited interest therein. In the same sentence which creates the gift the testator says that it is "to be used" by the widow "to support her and to educate my three children." I am of opinion that the intention of the testator as thus expressed was that his widow was to take only



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such an interest as she might *use* for the purposes named. If there is any ambiguity in the testator's language, other parts of the will may be examined in order to assist in determining his intention. Paragraph 4 shews that the testator contemplated the contingency of the wife not "using" the whole of the estate, and of her dying leaving an invalid or infant child, and under such circumstances he purports to divide the portion "still existent" among his children, giving a larger portion to the invalid or infant child than to the others. Thus it is clear from the language of para. 4 that the testator did not intend by the words in para. 3 of his will that his widow should be entitled to the whole estate absolutely. She having died without leaving an invalid or infant child, the event upon the happening of which his children were to take did not happen, and, therefore, they take nothing under the will, and but for para. 6 there would have been an intestacy in respect of the portion of the estate "still existent," but para. 6 gives such portion to the widow absolutely.

This construction of the testator's will gives full effect to each paragraph. For these reasons I am of opinion that the testator's widow at the time of her death was entitled beneficially to whatever portion of the testator's estate was then "existent," and that this appeal should be dismissed with costs.

MAGEE, J.A., agreed with MULOCK, C.J.O.

HODGINS, J.A.:—While no one can deny that the rule of construction which my brother Ferguson cites (*infra*) is correctly outlined by Lord Westbury, I find it difficult to apply it to this case.

The will gives the testator's real and personal property to his wife in terms enabling her to expend it all in order to "support herself and to educate my three children Katie Jessie and George." This, I think, gives her an absolute estate in it but charged with the education of the three named children. See *Re King* (1925), 57 O.L.R. 144, and the cases referred to in *Re Matthews* (1924), 56 O.L.R. 406. In consequence, clause 4 would be repugnant, and so inoperative. If this be not the correct interpretation, and if the will is to be so construed that any part of the estate unused for the purposes specified is dealt with by clause 4 then I am equally of opinion that the wife's estate takes it as part of the residue specifically given to her. When clause 4 is examined, it provides: (1) that in case any child should be an invalid one half of the part left unused by the widow should become the property of such child—the remaining half is undisposed of; (2) that if there should be no

sickly child, then if any child or children should be under age, that child or those children should receive twice as much of the said estate as those over age. Nothing is said in words giving any estate to those over twenty-one or in what proportions. To ascertain that, it would be necessary to imply equality amongst them as well as the gift of an estate therein.

Neither of the conditions upon which the sickly child or children or the minor child or children would become entitled to anything was fulfilled, and so an implied estate would lack any foundation in the words of the will, and rest upon circumstances other than those which the testator contemplated. This is somewhat emphasised by the gift of the residue to the wife. If the dispositions contained in the conditional clause fail because none of the contingencies have happened upon which they were to take effect, has not the testator given it to his wife by the residuary clause? It is clear that in both paragraphs he is dealing with what is left after his wife has been supported and his children educated, because each presupposes that the education of the children is at an end, otherwise it would not be given out and out to them in the events provided for at his wife's death.

Reading the whole will together, it seems to me that the implication—reasonable enough if the conditions were not so clearly expressed and if there were no residuary bequest—becomes wholly inapplicable and lacks a proper basis when the contingent events are shewn not to have come to pass, and a residuary clause is found in the will. It is repugnant to that devise, or, to put it in another way, the implication is unnecessary, as those who would take under it cannot do so because the conditions are unfulfilled.

While it is impossible to find any case exactly like this one, reference may be made to *In re Bagot*, [1893] 3 Ch. 348, and *In re Palmer*, [1893] 3 Ch. 369, as to the effect of a residuary devise.

In the former case it is laid down that "it is necessary to find a plain and *unequivocal* intention on the part of the testator not to include the property in the residuary estate." See also *Savage v. Tyers* (1872), L.R. 7 Ch. 356.

As expressed by Underhill and Strahan on the Interpretation of Wills, 1st ed. (1900), p. 124, "A gift of property in a will, described in a general manner by way of residue, will include all property within the general description which is not otherwise *effectively disposed of* by the will, *unless a clear intention is expressed* that some of this shall in no event form part of the residue."

Sir John Romilly, M.R., in *Barnet v. Barnet* (1861), 29 Beav.

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239, said (p. 244): "No doubt in many cases, *from the context of the whole will*, an intention may be discovered to give an estate to a person to whom no direct devise is made." And Kindersley, V.-C., in *Fitzhenry v. Bonner* (1853), 2 Drew. 36, expresses what is necessary to that discovery. He says (p. 40): "No doubt there are many cases where the Court will, in the absence of express gift, raise a gift by implication; but it will not do so unless *the implication is necessary, irresistible*; that is, where, looking at the language, at all the dispositions of the will, and the circumstances, there is *an irresistible inference in favour of implying a gift*."

For these reasons, I am of opinion that the judgment appealed from should be sustained and the appeal dismissed with costs.

FERGUSON, J.A.:—This is an appeal by five of the children of Alexander McClennan, deceased, from a judgment of Logie, J., declaring that by the 3rd paragraph of the will of Alexander McClennan, his wife Kate C. McClennan was given an absolute title to the property therein described, and that the subsequent directions or dispositions in respect of part of such property appearing in para. 4 of the will were inoperative and void.

The testator died in 1895, and left him surviving his widow and six children. The widow died on the 25th April, 1913, and at the date of her death the executors of Alexander McClennan had the following assets of his estate undisposed of:—

66 shares of the Grey and Bruce Loan Co., value \$3,300.00	
Deposit in the Bank of Montreal.....	1,914.64

Neil McDonald, one of the executors named in the will of Alexander McClennan, deposes that during the lifetime of Mrs. Kate C. McClennan the executors of Alexander McClennan treated his widow's interest in the estate of Alexander McClennan as a life-estate, and paid her only the income derived from the said estate; also that at her death none of the children of Alexander McClennan were invalids or under the age of 21 years; and the question is, whether the corpus of the estate of Alexander McClennan passed to his wife absolutely, and on her death to those entitled to her estate, or passed to his wife in trust to be used by her for her own support and to educate certain children during her life, and after her death to the testator's children in manner and shares set out in para. 4 of the will of Alexander McClennan.

In *In re Sanford*, [1901] 1 Ch. 939, Joyce, J., said (p. 941):—

"It has been said by the Court of Appeal (*In re Blantern*, [1891] W.N. 54) that the true way to construe a will is to form an opinion apart from the decided cases, and then see whether these



decisions require any modification of that opinion; not to begin by considering how far the will in question resembles other wills upon which decisions have been given."

This rule was adopted and followed in our own Courts in *Osterhout v. Osterhout* (1904), 7 O.L.R. 402, 8 O.L.R. 685, and other cases.

I therefore quote, for examination, the language of the will (setting out the will as above).

The respondents' contention, adopted by the learned Judge appealed from, is that para. 3 should be interpreted to mean: "I give devise and bequeath all my real and personal property except . . . to my wife *absolutely* to enable her to use it to support herself and educate my children;" and that para. 4 amounts to an inconsistent gift over, which is therefore inoperative and void.

The learned Judge relied upon *Re Walker*, 56 O.L.R. 517, and the cases therein collected.

The appellants cited a number of cases, most of which were considered in *Osterhout v. Osterhout* (*supra*), but relied particularly on *In re Sanford* (*supra*); *Shearer v. Hogg*, 46 Can. S.C.R. 492, considered in *Mills v. Biden*, 50 D.L.R. 241, 245.

The appellants' contention is that para. 3 should be interpreted as meaning: "I give devise and bequeath all my real and personal property except . . . to my wife for life in trust to be used by her to support herself and to educate my children named;" and on such interpretation they argue that on the death of the widow the property, now in the hands of the executors, vested in the persons whom the testator intended to benefit under para. 4 of his will.

The task of the Court is to find and give effect to the intention of the testator as gathered from the wording of the will, read in the light of the circumstances surrounding the testator. In *Re Walker* (*supra*) the Court found that the testator intended to make and expressed an intention to make an absolute gift and also expressed an intention to give something which, by reason of such prior absolute gift, was not within his power to give.

Such a construction is logical and well supported by authority, the principle being that a clear gift of an absolute estate will not be cut down by subsequent words, unless the intention so to cut down is clearly expressed, but it is, I think, equally well established that it is only where the prior gift is expressed in clear and unambiguous terms that the Court should or does depart from the general rule of endeavouring to give some meaning and effect to all the words of the will, from which it follows that if the words of gift are not such as clearly to express an intention to give an abso-

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lute estate, then it is our duty to endeavour to give some effect to all the words of the testator.

The interpretation put upon para. 3 by the learned Judge appealed from gives no effect to the words of para. 4; and this, I think, cannot be supported unless the words of gift in para. 3 clearly, unambiguously, and without doubt express an intention on the part of the testator to give the property to his wife absolutely. Neither the word "absolutely" nor any other word of like import is to be found in para. 3.

On the other hand, the paragraph is expressed in terms which, to my mind, amount to a direction, and impose an obligation on the testator's widow in respect of the use she is to make of the property. Such a direction, I think, is inconsistent with an intention on the part of the testator that his wife should own the property absolutely, and, if so minded, should not out of it provide for the education of his children named. In any event I am unable to say that the testator has, in clear and unambiguous terms, expressed an intention to give the property to his wife absolutely. In such circumstances we must, I think, endeavour to get at the true intention of the testator by reading para. 3 along with the other provisions of the will, and as part of the whole; and, when so read, I am unable to arrive at the conclusion that by para. 3 the testator intended to express and has expressed an intention to give his property to his wife absolutely.

Reading paras. 3 and 4 together, I can come to no other conclusion than that the testator intended that his wife should take a life-interest in the property, with an implied contingent power to encroach on the capital for the purposes of her maintenance and the education of the three children named (*Re Johnson* (1912), 27 O.L.R. 472), and that so much of his property as was not so used by his wife during her life should go to the persons expressly or impliedly named in para. 4.

I am also of opinion that the residuary clause only operates on such of the testator's property as is not disposed of by the preceding paragraphs.

That brings me to a consideration of the meaning and effect of para. 4.

The appellants contend that the use of the word "direct" along with the word "desire" gives a colour to the word "desire" which requires us to interpret or justifies us in interpreting the word "desire" as being a word of disposition rather than a word expressing a recommendation merely, and that consequently para. 4 should be read as expressing an intention on the part of the

testator thereby to dispose of such part of his estate as is described in para. 3 that remained unused or unspent at the date of the death of his wife, and that in order to give effect to the provisions of the 4th paragraph in favour of infant children or an invalid child it is necessary to imply a gift to his adult children or to his children generally.

The respondents divide the fourth paragraph into two parts: the first expressing a mere desire or recommendation in favour of an invalid child if there be one, the second expressing a direction and disposition in favour of an infant child if there be one, both conditional on the happening of certain events, which they say have not happened, and they argue that para. 4 is in the circumstances inoperative and that therefore the widow took under the residuary clause, numbered 6.

The appellants answer that the will must be construed by reference to the date of the will and that of the testator's death, and that, as the extra gift to the infant child could not be effective unless it be implied that the other children took a share that could be doubled, it must be implied that the testator intended by para. 4 to benefit his children generally, and his infant children or invalid child particularly, if such there was at the time of his widow's death, and they argue that, in the absence of an infant or invalid child, the children take equally and that therefore the residuary clause does not operate upon the property described in paras. 3 and 4.

The question then arises: Is it necessary, in order to give effect to the words of para. 4, to imply a gift to the children other than an infant or an invalid child.

The right and duty of this Court to imply a gift has been stated in many cases, and it is clear that such a gift is implied only where the implication is necessary to give effect to the expressed intentions of the testator.

The meaning of the words "necessary implication" has been considered in numerous authorities, many of which are collected and considered in Underhill and Strahan's *Work on the Interpretation of Wills*, 1st ed. (1900), pp. 27 to 30, and I think the meaning and effect of the cases is accurately expressed in the following, taken from p. 28:—

"Necessary implication has been defined by Lord Eldon, in *Williamson v. Adam* (1813), 1 V. & B. 422, as meaning, not natural necessity, but so strong a possibility of intention, that a contrary intention cannot be supposed. This definition has been adopted by James, L.J., in *Crook v. Hill* (1871), L.R. 6 Ch. 311,

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315, 316, who simplifies it thus: 'The question, then, resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will, and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude the children in question, as that a contrary intention cannot be supposed.'

The principles enunciated above were discussed and applied by the House of Lords in *Parker v. Tootal* (1865), 11 H.L.C. 143, and I think a statement of Lord Chancellor Westbury, found at p. 161, is applicable and of great assistance in arriving at a conclusion as to whether or not the words of para. 4 of this will enable us to imply or justify us in implying a gift to the children other than an invalid or infant child of the testator. In that case, Lord Chancellor Westbury said:—

"Implication may be founded upon two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction."

It is clear that effect could not be given to the direction, "Should it so happen that none of my children are sickly at the time of the death of my wife but that one or more of my said children are less than twenty-one years of age I direct that the said child or children shall receive twice as much of said estate as the child or each of the children that has attained the age of twenty-one years," unless it was implied that the child or children who have attained the age of twenty-one years were to receive a share, from which it seems to me to follow that the wording of this paragraph falls clearly within the law as stated by Lord Westbury and that we are enabled to and I think must imply that the testator intended that his children should share equally in the property described in paras. 3 and 4 unless there was an infant child or an invalid child, and that the shares of the infant children should be ascertained by doubling the amount of the share of the adult child.

There being no invalid child and no infant child, it follows



that the property of the testator still in the hands of his executors, being all the property described in para. 3, should be divided among his children equally. App. Div.  
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I would allow the appeal and declare accordingly. Costs of all parties out of the estate; those of the executor as between solicitor and client. RE  
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*Appeal dismissed (FERGUSON, J.A., dissenting).*

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[MEREDITH, C.J.C.P.]

AGRICULTURAL DEVELOPMENT BOARD V. DE LAVAL CO. LTD. AND BROWN.

1925.  
Nov. 3.

*Fixtures—Silo Erected on Farm as Part of Barn—Mortgage of Farm after Erection—Silo Expressly Included—Contract between Owner of Farm and Company Furnishing Labour and Materials—Provision for Right of Repossession upon Default in Payment—Contract not for Sale of Chattel—Conditional Sales Act, R.S.O. 1914, ch. 136, sec. 9—Non-compliance with Requirements of Act—Filing Required in Case of Fixture.*

The owner of a farm made an agreement with the defendants by which they were to do certain work and supply certain materials as part of a silo which he was erecting upon his farm as a part of his farm buildings. The silo was erected and was so connected with the owner's barn and stable as to make it a part of them. The writings forming the contract gave the defendants the right, upon default of payment of the price of the materials and labour, to enter and remove their structure, treating it as a manufactured article which might be the subject of a conditional sale; but in fact what the defendants did was to put together, upon the ground, material prepared elsewhere, each piece made ready to go into its place. The owner mortgaged his farm to the plaintiffs after the silo had been erected, the plaintiffs having no notice or knowledge that the defendants had or claimed any right to or interest in the silo or any part of it. The plaintiffs' mortgage expressly covered the structure which the defendants claimed as theirs, even if a chattel:—

*Held*, that the silo was part of the land and passed to the plaintiffs under their mortgage; and sec. 9 of the Conditional Sales Act did not apply so as to preserve the defendants' right to the structure if a fixture, the case not being one of the sale of a chattel.

If the Conditional Sales Act did apply, its provisions were not complied with: the builders' name was not on the structure, and the writings were not filed—filing is necessary in the case of a fixture. *Liquid Carbonic Co. Ltd. v. Rountree* (1923), 54 O.L.R. 75, considered.

ACTION by the Agricultural Development Board (established by the Ontario Agricultural Development Act, 1921, 11 Geo. V. ch. 32) for a declaration that a certain silo was part of the free-



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hold in land mortgaged to the plaintiffs; for an injunction restraining the defendants from removing the silo; and for damages and other relief.

September 22. The action was tried by MEREDITH, C.J.C.P., without a jury, at a Toronto sittings.

*F. P. Brennan*, for the plaintiffs.

*V. J. McElderry*, for the defendants.

November 3. MEREDITH, C.J.C.P.:—When the material facts only are found and plainly stated, there should not be much difficulty in coming to a right conclusion upon any question really involved in this case; and, there being little, if any, contradictory testimony as to the facts, there should be no difficulty in stating them.

The owner of a farm desired to add to his farm a silo, and planned to have it connected with his barns and stables; and he decided to have it made of cement and wood: the work therefore required the services of two trades—stonemasons' and carpenters'; and it was to be, and was, erected in three different parts—the cement substructures and passages; the crib-work roofed, built by the defendants of wood mainly; and the ensilage discharge duct, which was made of wood altogether, and connected the silo with the barn and stable.

The whole structure was intended to, and did, make the silo an integral part of the barn and stable.

The cement substructure formed part, though a small part, of the structure which contains the ensilage, and also provided passages from that part, and from the duct, into the stable, in the barn, where it is fed to cattle. The part of the structure erected by the defendants was built upon this substructure, and, to make a firm and air-tight connection between them, a rim—it was called a coping by the witnesses—of cement connected them. This is recommended by the defendants in their illustrated catalogue, which is filed as an exhibit; and, upon the testimony respecting it, I have no doubt that it is there, or was when the work was finished.

In the writings—a contract and two promises to pay the price of the defendants' work and materials—the matter is treated as if the defendants were selling to the landowners a specific article known as the De Laval silo; but it is quite obvious that that was not the real character of the contract. It was plainly a contract to do certain work and supply certain materials as part only of a silo which the landowner was erecting as a part of his farm buildings,

and part of his land. These writings gave the defendants the right to enter and remove their structure, treating it as if it were a mere manufactured article which might be the subject of a "conditional sale."

The fact that the "stuff" was got out in a factory can make no difference; that is so in regard to the stonemason and carpenter trades in nearly, if not quite, all structures in these days; so that now, if it cannot be said that the sound of the workman's tools is not heard in the erection, that all that is done in mill and factory, yet it is, in these days, mainly a putting together, upon the ground where the erection takes place, of material prepared elsewhere, each piece made ready to go into its place.

The landowner mortgaged his farm to the plaintiffs after the silo was erected; and, without any notice to, or knowledge of, the plaintiffs that the defendants had, or claimed, any right to or interest in the silo or any part of it.

So long as land registry, chattel mortgages, bills of sale, and conditional sales, enactments are deemed good moral laws, it must be said that the merits of the case are entirely with the plaintiffs, that the defendants should have made known, by registration, their secret agreement with the landowner, and it should be surprising, if not amazing, if the law of the land does not accord with such merits.

The defendants' contention was quite consistent with that view. What they said was that the part of the silo made by them was and is a chattel, and so it did not pass to the plaintiffs under their land mortgage.

But the plaintiffs' mortgage is not merely one of land; it expressly covers that which the defendants claim as theirs, even if a chattel. This provision in the mortgage seems to have been overlooked by the defendants.

Therefore, if the case is to be determined upon the defendants' claim and contention, the defence fails.

The plaintiffs' contention was and is that the silo is part of the land and that it passed to them under their mortgage, they having had no kind of notice or knowledge of the defendants' rights or claims.

They are, in my opinion, manifestly right in treating the silo as part of the land.

To this argument the defendants' answer was: If our structure is a fixture, our right to it is preserved by sec. 9 of the Conditional Sales Act.\*

\* R.S.O. 1914, ch. 136, sec. 9: Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully

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But that answer seems to me to be erroneous, for two reasons:—

The case is not one of the sale of a chattel, but is one merely of work done and materials provided in the erection of a building on the landowner's land, which was to be and is part of that land. The Conditional Sales Act is not applicable; the Mechanics and Wage-Earners Lien Act was.

Again, if the Conditional Sales Act applies, the defence fails because its provisions were not complied with. The builders' name was not and is not on the structure; and no notice of their writings, rights, or claims was given by filing the writings.

But it is said that that is not required in cases of fixtures. Why not? It is really doubly necessary. A movable chattel may be the property of any one; a fixture to the land is very much more likely to be the property of the owner of the land. It would be an extraordinary omission if no notice of secret agreements were required when the greater need of it and yet were required when lesser need.

One must not, in looking at a purpose of the legislation to soften the hardness of the law regarding fixtures, blind oneself as to the provisions of all the registrations enactments and the far greater mischief they were designed to prevent.

Nor can the defendants say that there is any hardship, for in the Mechanics and Wage-Earners Lien Act the law provided a means by which they might have preserved all their rights without doing the plaintiffs any injustice.

The case of *Liquid Carbonic Co. Ltd. v. Rountree* (1923), 54 O.L.R. 75, does not help the defendants; it should have the opposite effect, for, if the earlier provisions of the Conditional Sales Act do not apply to fixtures, why was not the case decided on that plain ground, why go to all the labour over the question of "after-acquired property?"

On each ground the defence fails: if a chattel; if a fixture; and if neither.

The injunction must be made perpetual; the silo must be restored, or damages paid, as the defendants may elect within ten days; otherwise damages to be ascertained and stated by the Local Master and to be paid within fourteen days after the confirmation of his report; and the defendants must pay all costs of this action.

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as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other encumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them.

## [APPELLATE DIVISION.]

GEARY V. ALGER.

1925.

Nov. 4.

*Libel—Newspaper—Report of Police Court Proceedings—Privilege—  
Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 11—Damages—  
Appeal.*

The judgment of RIDDELL, J., 57 O.L.R. 218, affirmed.

AN appeal by the defendants from the judgment of RIDDELL, J., 57 O.L.R. 218.

November 3 and 4. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

*J. E. Lawson* and *J. A. McGibbon*, for the appellants, contended that the report published by the appellants was privileged absolutely, within sec. 11 of the Libel and Slander Act, R.S.O. 1914, ch. 71. It was privileged at common law as fair comment on, or a report of, a judicial proceeding, and, in the absence of malice, the plaintiff could not succeed. They argued that the publication of the plaintiff's name in the report did not render the report libellous, because it was common knowledge that he was the person to whom reference had been made in the judicial proceeding. In any event, the damages awarded by the trial Judge were excessive, since the plaintiff claimed general damages only. Reference to *Lawyers' Co-operative Publishing Co. v. West Publishing Co.* (1898), 32 App. Div. (N.Y.) 585; *Clement v. Lewis* (1820), 3 B. & Ald. 702; *Turner v. Sullivan* (1862), 6 L.T.R. 130; *Hazlett v. Rand Daily Mails Ltd.*, [1911] W.L.D. 65 (Superior Court of South Africa), noted in annual digest appended to vol. 28 of the South African Law Journal; Gatley on Libel and Slander, p. 308; Odgers on Libel and Slander, 5th ed., p. 115.

*G. D. Conant*, for the plaintiff, respondent, was not called upon.

November 4. The judgment of the Court was delivered by MAGEE, J.A.:—The defendants appeal from the judgment against them for \$500 in an action for libel published in their newspaper, the *Oshawa Telegram*. The libel complained of was contained in a report of the proceedings before the Police Magistrate at Oshawa. One Kokernick was charged with assaulting a peace officer and pleaded guilty to assault. His counsel, in mitigation of punishment, sought to excuse his violence as caused by resentment against a person whom the counsel characterised in very abusive language. The learned trial Judge in this case has found



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as a fact that the counsel did not give the name of the person he was abusing, and it is not competent for this Court, in view of the contradictory evidence in this case, to disturb that finding.

The newspaper, in its account of the proceedings, gave the plaintiff's name as having been stated by the counsel as the person abused, and thus fastened on the plaintiff the accusation of conduct imputed by the libellous words, which, as actually used by the counsel, were impersonal or at least reflecting on some one unnamed. The article was made very prominent in the newspaper, with conspicuous headings, in one of which the word "spotter," which was not used by the counsel, occurred. The item, therefore, was not a fair or accurate report, without comment, of proceedings publicly heard before a court of justice.

On the findings of fact, whatever the truth of the case may be, the defendants were guilty of gratuitously attributing to the plaintiff the alleged conduct and of publishing as if against him the abuse therefor. They are not protected by any privilege either under the Libel and Slander Act, sec. 11, or at common law. They do not press any other ground of appeal except that the damages are excessive.

My Lord has already intimated that this Court cannot disturb the assessment of damages in the circumstances.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

1925.

Nov. 6.

RE CITY OF LONDON AND LONDON STREET RAILWAY CO.

*Street Railway—Agreement between Company and City Corporation—Passenger Fares—Reduced Rates—Validation of Agreement by Act of Legislature—Agreement not Made Part of Act—Binding on Parties as Contract only—Subsequent Legislation—Abolition of Reduced Fares "for the Unexpired Term of its Franchise"—Temporary Suspension—Possible Renewal of Franchise—36 Vict. ch. 99—52 Vict. ch. 79—59 Vict. ch. 105—12 & 13 Geo. V. ch. 141—14 Geo. V. ch. 141.*

By an Act of the Ontario Legislature, passed in 1896, 59 Vict. ch. 105, an agreement made by the London Street Railway Company with the Municipal Corporation of the City of London was validated. By this agreement the railway company was limited as to the prices to be charged for the transit of passengers on its lines, and was required to sell at reduced prices tickets to be accepted in lieu of the normal 5-cent fares during certain hours of the day. In 1922, by 12 & 13

Geo. V. ch. 141, the railway company was permitted to decline to furnish tickets at a reduced price, "for the unexpired term of its franchise." In 1924 an Act was passed, 14 Geo. V. ch. 141, which explained the Act of 1922 by declaring that its provisions applied only up to the 8th March, 1925, and from and after that day "the said Act shall be and the same is hereby repealed." While the franchise was to end on the 8th March, 1925, it might be renewed:—

*Held*, that the agreement validated by the Act of 1896, not being made part of the statute, was legal and binding upon the parties only as a contract; that the result of the subsequent legislation was simply to prevent the city corporation from insisting upon a sale of tickets at reduced prices until the 8th March, 1925; and, that day being past, the agreement was in full force and effect.

1925.  
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RE CITY OF  
LONDON  
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Co.

AN appeal by the city corporation from an order of the Ontario Railway and Municipal Board declaring that the street railway company's obligation to furnish tickets to passengers at a reduced rate had been destroyed by an Act passed by the Ontario Legislature in 1922, 12 & 13 Geo. V. ch. 41.

November 3. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

*D. L. McCarthy*, K.C., for the appellant corporation, argued that the company was not, by any legislation which had been passed, relieved from the obligation of selling the tickets at the reduced rate mentioned in the agreement of 1896, during the extended term of the franchise. The repealing of the Act by which the agreement was validated did not affect the agreement, which, though made schedule A to the Act of 1896, was not made part of the statute. It therefore remained binding on the parties to it: *Re Joyce and City of London* (1920), 47 O.L.R. 335; *City of Toronto v. Toronto Railway Co.* (1918), 44 O.L.R. 308. The company was only relieved from its obligation for a limited time. When the Act of 1924 came into effect, the agreement revived.

*Shirley Denison*, K.C., for the company, respondent, contended that by the legislation of 1922 the consensus of the parties in respect of the fares was destroyed, and the rates were thereafter regulated by statute. Nothing but a new bargain could restore the old bargain, and none such had been made. Counsel relied upon sec. 14 of the Interpretation Act. The word "thing" therein would include "contract."

November 6. The judgment of the Court was read by RIDDELL, J.A.:—This is a motion by way of appeal from an order of the Ontario Railway and Municipal Board of the 26th June, 1925, and involves an exceedingly important question.

Notwithstanding the importance to the citizens of London and

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Riddell, J.A.

the London Street Railway Company, of the question which has to be decided, the facts are exceedingly simple. The London Street Railway Company was incorporated by the Act of (1873) 36 Vict. ch. 99, and this was amended by the Act of (1889) 52 Vict. ch. 79. The London Street Railway Company then made an agreement with the Municipal Corporation of the City of London such as it was authorised to make by the Act of 1873, and came to the Legislature to get further legislation; and an Act was passed in 1896, 59 Vict. ch. 105, which, amongst other things, validated the agreement between the city corporation and the railway company which is set out as schedule A to the Act.

By this agreement the railway company, by virtue of clauses 25 (*d*) and 25 (*r*), was limited as to the prices to be charged for transit on its line. The amounts were substantially 5 cents, but seven tickets were to be sold for 25 cents during certain hours, and another class of tickets, nine for 25 cents during other hours, and the company was to keep a sufficient supply of tickets for sale at some convenient place in the city as well as upon its cars.

The company, finding it, as it was contended, impracticable to carry on its operations with that provision, came again to the Legislature, and in 1922 the Act 12 & 13 Geo. V. ch. 141 was passed, which, by sec. 1, permitted the railway company to decline to furnish the tickets at a reduced price "for the unexpired term of its franchise." This being considered to be ambiguous, the statute of 1924 was passed, 14 Geo. V. ch. 141, which explains the Act of 1922 as follows:—

"To remove doubts it is hereby declared that the provisions of chapter 141 of the Acts passed in 1922, intituled *An Act respecting the London Street Railway*, shall only apply up to the 8th day of March, 1925, and from and after the said 8th day of March, 1925, the said Act shall be and the same is hereby repealed."

The question arises by reason of the provision that while the franchise is to end on the 8th March, 1925, it may be renewed.

The city corporation contends that the obligation to sell the tickets at a reduced rate, as mentioned in the contract of 1896, is continued into the extended term of the franchise, whereas the street railway company contends that its obligation to furnish such tickets has been destroyed by the legislation of 1922. The Board has acceded to the argument of the railway company, and the city corporation now appeals.

I am not inclined to quarrel with the statement of the general law made by the learned Chairman of the Board, but it seems to me that he has not apprehended the result of the legislation.

The agreement, schedule A to the Act of 1896, while it is validated by legislation, is not made part of the statute, and the result has been determined in cases in this Court: *Re City of Toronto and Toronto and York Radial Railway Co. and County of York* (1918), 42 O.L.R. 545, and *City of Toronto v. Toronto Railway Co.* (1918), 44 O.L.R. 308, at p. 316. While legal and binding, it is legal and binding as a contract upon the parties, it is no different from any other contract: *City of Kingston v. Kingston Electric Railway Co.* (1898), 25 A.R. 462, at pp. 468 and 469. *Re Joyce and City of London*, 47 O.L.R. 335, discusses this very contract and points out that it is not made part of the Act: see p. 341.

While acceding to the proposition that the repeal of a statute leaves matters in the same condition as though the statute had never been passed, except so far as the rule may be modified by sec. 14 of our Interpretation Act, it seems to me that this statement of the law tells against the holding of the Board.

The state of affairs was this. The city corporation and the railway company had a contract, concerning the validity of which there might be some doubt, but which was made by the legislation of 1896 absolutely binding and legal so that it could not be attacked. The Legislature, considering that the franchise of the company came to an end on the 8th March, 1925, passed the legislation of 1922 to enable the railway company to avoid selling the tickets at a reduced price for the term of what was understood to be its franchise, and used the expression "for the unexpired term of its franchise." It, however, being brought to the attention of the Legislature that this might be ambiguous, legislation was passed in 1924 placing the matter beyond dispute, the statute of 1924 being really an interpretation of the statute of 1922. The result was that the legislation was simply effective to prevent the city corporation claiming a sale of tickets at the reduced prices until the 8th March, 1925. The agreement itself was not interfered with except to that extent and only for that period. The agreement was not abrogated, dissolved, or repealed; it was allowed to remain in full force and effect except for a limited purpose and for a limited time. The time having now elapsed, there is no possible reason why the agreement should not be held in full force and effect, and we should so declare.

*Appeal allowed with costs.*

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LONDON  
AND  
LONDON  
STREET  
RAILWAY  
Co.

Riddell, J.A.



## [APPELLATE DIVISION.]

1925.

WRIGHT V. RITCHIE.

Nov. 6.

*Contract—Sale of Goods to Company—Judgment for Price of Goods Entered against Company—Alternative Claim against President of Company upon Dishonoured Cheque for Part of the Price—Effect of Judgment—Separate and Distinct Contract with President—Right to Recover upon Cheque—Consideration—Release.*

The plaintiffs sued the R. company and J. R., the president and manager of the company, claiming \$822.50 for goods sold and delivered and in the alternative, from the defendant J. R., \$550, being the amount of a cheque drawn on a bank by J. R. personally and sent to the plaintiffs as a payment on account of the \$822.50. The bank refused payment of the cheque, there being only \$212 to the credit of J. R. The defendant company entered no appearance, and the plaintiffs signed judgment by default against it, but realised nothing upon execution duly issued and placed in the hands of the sheriff. The contract under which the goods were delivered was with the defendant company, through J. R.; and the plaintiffs, before the receipt of the cheque, were aware that the company was their debtor:—

*Held*, assuming that the plaintiffs could have selected R. as their debtor for the price of the goods supplied, after knowledge that he was only an agent, that the conduct of the plaintiffs in taking judgment against the company prevented them from enforcing the claim against R.; but the contract evidenced by the cheque was not the same contract as that upon which the company was sued; there was ample consideration for the cheque; R. was not released by the plaintiffs; and judgment was properly given against him for the amount of the cheque.

*Campbell Flour Mills Co. Ltd. v. Bowes* (1914), 32 O.L.R. 270, followed.

AN appeal by the defendant John Ritchie from the judgment of the County Court of the County of York in favour of the plaintiffs in an action for the price of goods sold and delivered and in the alternative for the amount of a dishonoured cheque.

October 28. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

*J. R. Roaf*, for the appellant.

*J. E. Corcoran*, for the plaintiffs, respondents.

November 6. The judgment of the Court was read by RIDDELL, J.A.:—The defendant the Ritchie Construction Company Limited is a limited liability company, with head-office in Lincoln county, but carrying on business in Toronto; the defendant John Ritchie is president and manager of the company. The plaintiffs, a partnership, also in Toronto, sue on a specially endorsed writ, claiming “\$822.50 for goods sold and delivered, and in the

alternative the plaintiffs claim from the defendant John Ritchie the sum of \$550, being the amount of a cheque dated the 14th day of December, 1923, and returned n.s.f., together with the sum of \$2.13, protest fees thereon." Particulars are properly endorsed. This endorsement may be considered broad enough to allow the plaintiffs to recover on the cheque if otherwise entitled.

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The defendant Ritchie put in an affidavit of merits, saying that he did not purchase the gravel sued for, and adding: "I have no recollection or knowledge of the cheque alleged to be signed by me."

Of course this affidavit was wholly insufficient to entitle him to defend on the cheque—his recollection or existing knowledge of signing the cheque was *nihil ad rem*, was wholly immaterial; and no "facts and circumstances which" could "entitle him to defend the action" were set out, as required by Rule 56(1). But the plaintiffs treated the affidavit as sufficient and went down to trial—we therefore pay no attention to this irregularity.

The defendant company entered no appearance, and the plaintiffs signed judgment by default against it, issued execution thereon, and placed the writ in the hands of the Sheriff of Lincoln, but he can realise nothing.

The action went on to trial and resulted in a judgment for the plaintiffs against the defendant John Ritchie, who now appeals.

The facts must be examined with care. They seem to be as follows:—

The defendant company, through Ritchie, its president and manager, entered into a contract with the plaintiffs for gravel to build a certain bridge. The plaintiffs delivered a considerable amount of gravel and were pressing for payment, naturally wanting a cheque on account. Ritchie's son said that a cheque was "coming through;" and on the 19th December, 1923, there came through the mail a cheque on the Standard Bank in favour of the plaintiffs for \$550, admittedly signed by Ritchie, although he swears that he cannot remember about it. The covering letter is signed by Ritchie "per D.M.," and reads: "Please find enclosed cheque for \$550 re gravel. Kindly draw the balance of the 35 yards and 8 loads as well. Have at least 50% stone in same." The letter is on the defendant company's paper.

The plaintiffs presented the cheque, and it was refused, n.s.f., there being only \$212 to the credit of Ritchie in the bank; it was returned to the plaintiffs protested. The plaintiffs then supplied further gravel. On the 18th January, 1924, Ritchie wrote to the

App. Div. plaintiffs: "We were to have an estimate coming next Monday so  
 1925. that I could pay you, but with the accident at the bridge I am in  
 WRIGHT doubt about their issuing any. However, the money is coming,  
 v. and if you will give me a little more time you will be paid in full.  
 RITCHIE. . . . At the time I sent you the cheque it was perfectly in  
 Riddell, J.A. order and legitimate, but between the time of issuing the cheque  
 and presenting it at the bank a party I had some money from  
 . . . . withdrew his security, and that left me short at the  
 bank. . . . I am very sorry this happened, but . . . .  
 you will see that I issued the cheque with perfectly honest inten-  
 tions."

It may be said in passing that it is somewhat difficult to recon-  
 cile the statements in this letter with those in the affidavit of  
 merits.

The plaintiffs saw and wrote the township corporation for  
 which the bridge was being built, but were informed that the  
 defendant company was liable.

The plaintiffs, on the 25th January, wrote to Ritchie a cour-  
 teous letter which does not contain any agreement to give time,  
 but accepts the explanation concerning the cheque being n.s.f., "as  
 that is liable to happen to any of us." One of the plaintiffs, how-  
 ever, swears thus:—

"Q. And, having gotten this letter, then did you give him  
 time? A. Yes.

"Q. Until when? A. Well, I think it was up to May of last  
 year" (1924).

Cross-examination:—

"Q. . . . Did you give them any definite time, say that  
 you would wait one week or two weeks? A. No.

"Q. You simply waited, that was all you did, was not it, or  
 what did you do? I want to know how you gave them time and  
 how long you gave them? A. We give them as much length of  
 time—Mr. Ritchie was going to get the Township into Court.

"Q. What? A. Mr. Ritchie wanted time on it to get the Town-  
 ship to sue them, and he said—

"Q. Well, I am asking you what time you told Mr. Ritchie he  
 would have—you did not tell him any time? A. We did not, no. I  
 did not state any time."

Before the receipt of the cheque, the plaintiffs, who had not at  
 first known of the company, were aware that their contractor was  
 really the company, and Ritchie was acting as its manager in  
 making the contract, but on the 18th January they made out an

account against Ritchie personally for \$822.50, making the following entry at the end of the account:—

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“Total .....	\$822.50	
“Cheque received for \$550.00 funds in bank for amount of .....	212.50	
“Balance of account in full .....	\$610.00.”	

This somewhat extraordinary account and entry shew, if they shew anything, that the cheque was well understood to be on account of the company's debt, and that the plaintiffs were looking to Ritchie to pay the balance, expecting the bank to pay them on the cheque the amount at the credit of Ritchie when it was presented.

Assuming that Ritchie could have been selected as the debtor for the goods supplied, even after it was discovered that he was only an agent, it is argued that the conduct of the plaintiffs in taking judgment against the company prevents the plaintiffs from now enforcing the claim against him.

In judgments binding upon us—*M. Brennen & Sons Manufacturing Co. Ltd. v. Thompson* (1915), 33 O.L.R. 465, at p. 472, and *Campbell Flour Mills Co. Ltd. v. Bowes* (1914), 32 O.L.R. 270, at pp. 277, 278—the Court has laid down the law, and it need not be detailed here.

But it is argued by the plaintiffs that the contract evidenced by the cheque sued on against Ritchie is not the same as that sued on against the company—and I am clear that such is the case.

It is quite true that if the cheque had been paid, the amount received would have gone in ease of the company—but that would be the case were the cheque that of a complete stranger to the original contract.

This Court has laid down the law thus in *Campbell Flour Mills Co. Ltd. v. Bowes*, 32 O.L.R. 270, at pp. 279, 280:—

“If A. and B. are jointly and severally bound to C., and C. sues A. alone to judgment, that does not bar his action against B. The contract of A. to pay is merged and *transit in rem judicatam*, but the separate contract of B. is wholly unaffected. Payment will operate as a bar, but not judgment.

“Where there are joint and several contracts, or joint and several debts, or where the several parties are independently and collaterally bound by the same obligation, the recovery of judgment against one of such separate contractors or separate debtors is no bar to an action against the others, until the judgment has been



App. Div. satisfied: Addison on Contracts, 11th ed., p. 193. This is as old  
 1925. as Queen Elizabeth's time (*Blumfield's Case* (38 & 39 Eliz.), 5 Co.  
 R. 86B), and cannot be doubted. See *per* Montague Smith, J.,  
 WEIGHT giving the judgment of the Court in *Vestry of Bermondsey v.*  
 v. *Ramsey* (1871), L.R. 6 C.P. 247, at p. 251; *per* Stirling, J., in  
 RITCHIE. *Blyth v. Fladgate*, [1891] 1 Ch. 337, at p. 353. And it makes  
 Riddell, J.A. not the slightest difference that the amount secured by the inde-  
 pendent contracts is the same and for the same debt.

"In *Drake v. Mitchell* (1803), 3 East 251, one of three joint  
 covenantors gave a bill of exchange for part of the debt, and judg-  
 ment was obtained thereon. It was held that there was no defence  
 to an action upon the covenant against the three. The bill was not  
 taken for the payment and in discharge of the debt, and the judg-  
 ment could not be a merger of the covenant.

"In *Cambefort v. Chapman* (1887), 19 Q.B.D. 229, a partner  
 gave a bill of exchange for the amount of the partnership debt.  
 Judgment was obtained on the bill, and this was held by a Divi-  
 sional Court to be a bar to an action for the debt; but this was dis-  
 approved by the Court of Appeal in *Wegg Prosser v. Evans*,  
 [1895] 1 Q.B. 108, holding that *Drake v. Mitchell* is good law, and  
 that the principle of *Kendall v. Hamilton* (1879), 4 App. Cas.  
 504, did not apply.

"The general principle will be found thoroughly discussed in  
 the cases mentioned and in *King v. Hoare* (1844), 13 M. & W.  
 494; *Scarf v. Jardine* (1882), 7 App. Cas. 345."

No doubt in such cases as *Cambefort v. Chapman*, 19 Q.B.D.  
 229, if the cheque had been paid, the other debtor would have been  
 released; but that fact did not make the contracts of cheque and  
 debt the same.

I agree that there was ample consideration for the cheque, as  
 found by the learned County Court Judge.

I am of opinion that the judgment appealed from is right.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

1925.

UNION BANK OF CANADA v. BENEDICT.

Nov. 6.

*Receiver—Equitable Execution—Judgment against Married Woman—  
 Separate Property—Income Payable under Terms of Will—Restraint  
 upon Anticipation — Arrears — Married Women's Property Act,  
 R.S.O. 1914, ch. 149, sec. 5(1),(2).*

Judgment for the recovery of money having been entered by the plain-  
 tiffs against the defendant, a married woman, in the usual form, the

plaintiffs sought to reach by means of a receiving order certain property to which the defendant was entitled under the will of her father, but which, by the will, she was restrained from anticipating:—*Held*, that, as there was a valid restraint upon anticipation existing at the date of the contract upon which the plaintiffs' judgment was recovered, the property was excepted, by subsec. 2 of sec. 5 of the Married Women's Property Act, from the power to contract conferred by subsec. 1.

*Wood v. Lewis*, [1914] 3 K.B. 73, applied and followed.

The omission from subsec. 2 of the words "at that time or thereafter," found in the corresponding English enactment, does not affect the meaning of the statute.

*Semble*, had there been at the date of the contract any arrears in respect of income from the estate of her father payable to the defendant under the will, these arrears would have been, upon the principle of *Hood Barrs v. Heriot*, [1896] A.C. 174, separate property and bound by the contract.

AN appeal by the defendant Mary I. Benedict, a married woman, from an order of WRIGHT, J., in Chambers, appointing a receiver of the appellant's share in the estate of her father, Peter McLaren, deceased.

October 29. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

*A. D. Armour*, for the appellant, argued that the interest to which she was entitled under the will of Peter McLaren was not separate estate within the meaning of the Married Women's Property Act, R.S.O. 1914, ch. 149, and was in any case subject to a restraint against anticipation within the meaning of that Act: see secs. 5(2) and 21. Even though income as to which there is a restraint from anticipating when in arrear is freed from the restraint, this does not render it exigible under a judgment based upon a contract, due regard being had to the operation of the excepting clause: *Brown v. Dimbleby*, [1904], 1 K.B. 28; *Wood v. Lewis*, [1914] 3 K.B. 73; *Barnett v. Howard*, [1900] 2 Q.B. 784; *Whiteley v. Edwards*, [1896] 2 Q.B. 48; *In re Lumley, Ex p. Hood Barrs*, [1896] 2 Ch. 690; *Bolitho & Co. Ltd. v. Gidley*, [1905] A.C. 98.

*H. S. Honsberger*, for the plaintiffs, respondents, contended that *Wood v. Lewis* and all other English cases decided on the English Married Women's Property Act, 1893, do not apply to cases to be decided on the Ontario Act, inasmuch as the Ontario Act is different from the English Act in not including after the word "which" in the third line of subsec. 2 of sec. 5 the words "at that time or thereafter." In determining, according to secs. 5(2) and 21. Even though income as to which there is a re-  
 cipation, the date of the judgment, and not the date of the contract

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upon which the judgment is founded, is the determining factor. The decision of the House of Lords in *Hood Barrs v. Heriot*, [1896] A.C. 174, should be recognised as laying down the true interpretation of the Ontario Act, and the effect of restraint on anticipation. Reference to *Colyer v. Isaacs* (1897), 77 L.T.R. 198, and Halsbury's Laws of England, vol. 16, para. 740.

November 6. The judgment of the Court was read by MIDDLETON, J.A.:—Appeal by the defendant Mary I. Benedict from an order of Mr. Justice Wright, bearing date the 18th September, 1925, by which he appointed Mr. Clarkson receiver of the share or interest of the defendant Mrs. Benedict in the estate of the late Peter McLaren. The appointment was intended to be by way of equitable execution, based upon a judgment bearing date the 30th December, 1924, for \$10,381.64, and certain costs, being the amount due upon a promissory note, bearing date the 20th October, 1919, or \$10,000 with interest at 7 per cent. The judgment is in the usual form so far as the defendant Mrs. Benedict is concerned, she being a married woman. The sums recovered “are to be levied out of the separate property of the said Mary I. Benedict which she is now or may hereafter be possessed of or entitled to . . . and not otherwise, but this judgment shall not render available to satisfy the said sum any separate property which the said defendant Mary I. Benedict was or may be restrained from anticipating, unless,” etc.

Mary I. Benedict, the judgment debtor, is the daughter of the late Peter McLaren, who died on or about the 23rd May, 1919, about 5 months prior to the making of the note sued upon, and he, by his will, conferred certain benefits upon his daughter which are now sought to be reached by her judgment creditors. The first provision in the will is that, after setting apart \$100,000 as a fund for the production of an annuity for his widow, the sum of \$50,000 shall be set apart for each daughter, the income arising therefrom to be paid to the daughter during her natural life and after her death the income is to be paid to her children until the youngest attain the age of 21 years, when the corpus is to be divided among the children, but if a daughter die without lawful issue the corpus is to go to the surviving sons and daughters.

The second provision of the will relates to the \$100,000 the income of which is to go to the wife, and upon her death, after the youngest surviving daughter shall have attained the age of 40 years, the whole is to be divided. The widow died on the 29th May, 1923, and the youngest surviving daughter attained the age of 40 years in 1920.

The third provision is a residuary gift, each child being entitled to a share in the residue.

By the 14th clause of the will all the devises (which, no doubt, was intended to cover bequests) are made without power of anticipation, and there is a provision that in case of any devisee or legatee alienating or attempting to alienate his share or legacy by way of anticipation it shall be entirely in the power and discretion of the trustees to withhold the devise or legacy, in whole or in part, and to pay the same to the other legatees or devisees in equal shares.

The estate of Peter McLaren was found to be in a very involved condition. His main estate consisted of a large tract of land in Virginia of very uncertain value, and which has so far proved to be unsaleable. The resources of the estate have been somewhat taxed to meet the outgoing obligations for taxes, etc., in connection with this property. The result has been that comparatively small sums have been paid to the beneficiaries, and the sums of \$100,000 and \$50,000 have never been set apart for the beneficiaries. Owing to some dissension in the family as to the management of the estate, an administration decree has been pronounced, and under it about \$127,000 has been paid into Court. This has not yet been dealt with in the course of administration, as it is in reality largely being held to meet the outgoings in respect of the Virginia land, which it is hoped will in the end realise a very large sum. When this sum is realised, there will, no doubt, be a considerable amount payable to Mrs. Benedict, not only by way of arrears of the income payable to her in respect of her \$50,000 fund, but also with respect to her share of the \$100,000 to be held for her mother. The residuary estate is not divisible until realisation takes place. The receivership order in question is intended to operate upon the first two sums.

The appeal is launched upon the theory that, while a contract made by a married woman after the 13th April, 1897, binds all separate property which she may at the time of the contract, or thereafter, possess or be entitled to, it is prevented, by subsec. 2 of sec. 5\* of the Married Women's Property Act, R.S.O. 1914, ch. 149, from in any way operating upon "any separate property which she is restrained from anticipating;" and that, even though income as to which there is a restraint from anticipating when in

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\*Section 5 reads as follows:—

5.—(1) Every contract entered into by a married woman on or after the 13th day of April, 1897, otherwise than as an agent

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she was or was



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arrear is freed from the restraint, this does not render it exigible under a judgment based upon a contract, due regard being had to the operation of the excepting clause.

Unless the slight difference between the wording of our statute and the English Act, relied upon by the respondents, distinguishes the cases determined in England, the matter is, I think, concluded by authority. *Hood Barrs v. Heriot*, [1896] A.C. 174, conclusively determines that, where a married woman is entitled to property for her separate use without power of anticipation, the restraint on anticipation does not apply to income accrued due, and under the law applicable to the case, i.e., the Act of 1882, a judgment creditor was entitled to enforce a judgment against income which had accrued due before the date of the judgment. The effect of the English Act of 1893 has been discussed in a series of cases which need not be reviewed in detail. In *Wood v. Lewis*, [1914] 3 K.B. 73, they were all reviewed and considered, and it was held that, where there was a valid restraint upon anticipation existing at the date of the contract, money which thereafter became payable could not be reached under a judgment based upon the contract, even though at the date of the judgment it had unquestionably become freed from the restraint from anticipation, upon the doctrine of *Hood Barrs v. Heriot*; because the statute itself had provided that the power to contract conferred by the Act of 1893 upon the married woman should not enable her to contract so as to bind separate property which she was restrained from anticipating.

In 1897 the English Act was adopted here, with the omission of certain words from the clause in question. The English Act provides that the contract shall not render available separate property which *at that time or thereafter* she is restrained from anticipating. The words "at that time or thereafter" are not found in our Act; but, although in the arguments and judgments in cases in England much stress is laid upon these words, I cannot see that their omission in any way affects the meaning of the statute. The property sought to be reached here is property which the married woman is restrained from anticipating. Both statutory

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not in fact possessed of or entitled to any separate property at the time when she entered into such contract;

(b) shall bind all separate property which she may at the time or thereafter possess or be entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert possess or be entitled to.

(2) Nothing in this section shall render available to satisfy any liability or obligation arising out of such contract any separate property which she is restrained from anticipating.

expressions refer to the date of the contract, and once it appears that there was a restraint at the date of the contract the only possible construction of the statute is that the property is excepted from the power to contract conferred by subsec. 1.

Had there been any arrears at the date of the contract, then these arrears would, upon the principle of *Hood Barrs v. Heriot*, have been separate property and bound by the contract; but, regard being had to the dates above stated, there is no room for any suggestion that there was anything in arrear at the date of the contract. It follows that a receiver should not be appointed, for in no aspect of the case presented is there anything exigible in satisfaction of the judgment obtained. The receivership is an attempt to reach under this judgment something that is not liable to be taken towards its satisfaction.

The appeal should be allowed and the costs of the judgment debtor should be set off *pro tanto* against the judgment.

*Appeal allowed.*

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[APPELLATE DIVISION.]

[IN BANKRUPTCY.]

RE RANKIN AND BROWN.

*Bills of Sale and Chattel Mortgages—Inaccurate Description of Location of Goods Mortgaged—Sufficiency in View of Circumstances—Bills of Sale and Chattel Mortgage Act, sec. 10—Bankruptcy—Claim by Chattel Mortgagees.*

A chattel mortgage made by the debtors to the claimants was attacked by the trustee in bankruptcy of the estate of the debtors, upon the ground that it was void under sec. 10 of the Bills of Sale and Chattel Mortgage Act, because of an erroneous description in the location of the property mortgaged. The goods intended to be mortgaged were all the stock in trade and certain specified machines, the property of the mortgagors, contained in a building in the city of Toronto in the rear of No. 551 Queen street west. This building was in fact separated by a lane from No. 551. In the instrument the goods were described as all the goods and chattels which were, on the date of the mortgage, the property of the mortgagors and situated "in, around, and upon the premises known as 551 Queen street west." After-acquired chattels were also included. The mortgagors carried on business in no other place; access to the building in the rear was ordinarily obtained by a lane immediately west of No. 551; that was in fact the only number by which the location of their premises was known; and no creditor or other person could be misled by the designation commonly used:—

*Held*, that the description was sufficient.

Review of the authorities.

*Hovey v. Whiting* (1887), 14 Can. S.C.R. 515, specially referred to.

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MOTION by the trustee in bankruptcy of the estate of M. D. Rankin and Annie Brown, carrying on business in partnership under the name of "Canada Quilting Company," to set aside as fraudulent and void a chattel mortgage made by them to J. B. Henderson & Co. Ltd., who claimed, by virtue of the chattel mortgage, goods in the hands of the trustee.

May 18. The motion was heard by FISHER, J.

*H. M. Finkle*, for the trustee.

*R. H. Sankey*, for the claimants.

June 1. FISHER, J.:—The debtors carried on business as manufacturers in the city of Toronto, and by a receiving order, made on the 25th March, 1925, were declared bankrupt.

On the 21st August, 1924, the chattel mortgage in question was given to the claimants as mortgagees by Annie Brown and M. D. Rankin, trading as the Canada Quilting Company, mortgagors. The mortgage was registered within the statutory period, was given as security for future advances in goods, and the recitals in the mortgage correctly describe the agreement entered into between the parties. The mortgagees are making claim only for advances in goods since the mortgage was given.

The property covered by the chattel mortgage is described in the body of the mortgage as follows: "All and singular the goods and chattels particularly mentioned and set forth in the schedule endorsed hereon (or hereunto annexed and marked with the letter A) all of which said goods and chattels *are now the property of the said mortgagors* and are situate in, around, and upon the premises known as 551 Queen street west, Toronto, in the county of York, in the Province of Ontario."

The schedule endorsed on the mortgage reads as follows: "All the stock in trade, raw material and manufactured goods, and all the goods, chattels, and effects, now or hereafter in or upon the premises 551 Queen street west, Toronto: 1 Garnett machine, 1 picker and 1 blower, and the accessories of same, and all the tenant's fixtures, the property of the mortgagors, in or about the said premises."

The mortgage is attacked on two grounds: (1) that it is void under sec. 10 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, because of an erroneous description in the *location* of the property mortgaged, there being no goods of the debtors, at the time of or since the execution of the mortgage, on the premises 551 Queen street west, Toronto, as described in the



mortgage; and (2) that the mortgagees, at the time they took the mortgage, had knowledge of the insolvency of the debtors, and that the debtors were insolvent within the meaning of the Bankruptcy Act and the Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 5.

Section 10 of the Bills of Sale and Chattel Mortgage Act reads as follows: "Every mortgage and every conveyance or agreement required to be registered under this Act shall contain such sufficient and full description of the goods and chattels that the same may be thereby readily and easily known and distinguished."

On the evidence, I have no difficulty in disposing of the second objection raised by the trustee. The evidence is that the mortgagors' credit was such that they could not purchase goods in large quantities, and the mortgagees, who were financially strong, entered into an arrangement with the debtors that they (the mortgagees) would purchase goods on their own credit on a 5 per cent. buying commission basis, plus freight and interest, and then the mortgagees were to re-sell the goods to the debtors, and, upon their manufacturing the goods into comforters, the mortgagees were to purchase the comforters on the terms agreed upon. The mortgagees did purchase goods and were reluctant to make delivery of any of them to the debtors without security. After some negotiations, the terms of the mortgage in question were agreed upon, and the mortgage was executed, delivered, and registered.

At this time the mortgagees knew that the debtors were unable to pay the freight charges and interest, but it is to be noted that they were indebted to the mortgagees in about the sum of \$50 only. They were hard up, but there is no evidence that they had been sued or were being pressed by their creditors. There is no positive evidence that the debtors were, to the knowledge of the mortgagees, insolvent within the meaning of the Bankruptcy Act. Their financial position was described by a witness, Alexander Collins, who was the debtors' bookkeeper and auditor at the time the mortgage was given. He swore that the debtors were then experiencing some difficulty in meeting their liabilities, but that they were making payments on account to their different creditors on overdue paper and renewing for the balance.

I am of opinion that the giving of the mortgage was a perfectly legitimate business transaction, that it was made *bonâ fide*, entered into with the object of assisting the debtors, and with no intention to prefer or be preferred on the part of either of the parties thereto.

The trustee's motion on this branch of the case must be dismissed.

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The first objection, although technical, is one of substance. It is admitted that the mortgagors did not carry on business at 551 Queen street west, Toronto, and that they had no goods or chattels situate in, around, and upon the premises known as 551 Queen street west. The fact is that 551 Queen street west is a barber-shop. The mortgagors had no place of business in Queen street west, Toronto, but had a warehouse in which they carried on their business in the rear of 551 Queen street west, and entrance thereto and exit therefrom were by a public lane running south from Queen street back to the mortgagors' premises, and also by a lane running north from Richmond street, and a lane running from Portland street on the west to Augusta avenue on the east.

Counsel for the mortgagees contends that the description in the mortgage of the chattels is not so indefinite as to render the document void, and that there is sufficient material on the face of the mortgage to indicate how the mortgaged property may be identified by proper inquiry; in any event that the question whether or not the description is sufficient to enable the mortgaged goods to be distinguished is a question of fact, and oral evidence is admissible to throw light upon that fact, referring to *Woollings v. Barr* (1919), 46 O.L.R. 1, and *Hovey v. Whiling* (1887), 14 Can. S.C.R. 515; and that the evidence on the motion proved that the description was sufficient to identify the goods.

Counsel for the trustee contends that the erroneous description is fatal to the validity of the mortgage, that the exact location of the goods should have been given in the mortgage, so that if inquiry should be made in the place where they are described as being located they may be easily identified.

No doubt the aim and object of sec. 10 of the Bills of Sale and Chattel Mortgage Act was to enable persons having business transactions with mortgagors to ascertain with reasonable certainty, by inspection of the document, which particular property of the mortgagor is covered thereby and where that property is located. It is clear from the mortgage produced that the goods intended to be covered are described as of a "class;" and, following *Fraser v. Bank of Toronto* (1860), 19 U.C.R. 38, and *Holt v. Carmichael* (1878), 2 A.R. 639, mention of the correct locality is indispensable; and, if the locality be the only means of identification afforded by the mortgage, and that be wrong, the description is wrong and insufficient. See also *Grass v. Austin* (1882), 7 A.R. 511. In that case the mortgagor was described as owning parts of lots 13 and 14 in the 2nd concession of Murray, and gave a chattel mortgage on certain crops, grain, hay, etc., and described them as "now being on

the premises situate on the north-east half of lot 14 in the 2nd concession and north half of lot 14 in the said concession of Murray," and it was held that crops and hay on lot 13 could not pass.

In *Donnelly v. Hall* (1885), 7 O.R. 581, it was decided that the words "now in and upon," etc., expressly limit the goods to the locality to which they refer and cannot be extended to adjacent or similarly known premises, and that if the locality is incorrectly stated it may be rejected as surplusage, if, without it, there be in the mortgage a description from which the goods may be identified. See also *Accountant of the Supreme Court of Judicature v. Marcon* (1899), 30 O.R. 135, and *Williams v. Leonard* (1896), 26 Can. S.C.R. 406. In that case the goods were described as "all of which said goods and chattels are now the property of the said mortgagor and are situate in and upon the premises of the London Machine Tool Company . . . on the north side of King street, in the city of London;" and the schedule referred to in the mortgage contained the following additional description, "and all machines . . . in course of construction or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor . . . or which are now or shall be on any other premises in the said city of London;" and it was held, affirming the decision of the Court of Appeal, that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could the description was not sufficient within the meaning of the Act to cover machines so manufactured.

Schedule A of the mortgage in the present case reads as set out above.

As stated, there is no stock in trade, raw material or manufactured goods, on the mortgagors' premises at 551 Queen street west, and there may have been many Garnett machines, pickers, and blowers on the mortgagors' premises, if correctly described. Suppose the words "now or hereafter in or upon the premises 551 Queen street west, Toronto," were stricken out of the mortgage, would there be anything left in the way of description sufficient to satisfy sec. 10?

Counsel for the mortgagees cannot derive any assistance from *Woollings v. Barr*, *supra*. All that case decided was that oral evidence of circumstances attending the execution of the mortgage is admissible in order that proper inferences may be drawn as to the instrument; but in the present case the oral evidence shews

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that the mortgagors had not and never had any goods in 551 Queen street west; consequently a mortgage on their goods in 551 Queen street west passed nothing to the mortgagees, and the fact that the mortgagors had goods in their place of business near 551 Queen street west, which they intended to mortgage, merely shews that the mortgage as drawn does not contain "such sufficient and full description of the goods and chattels that the same may be thereby readily and easily known and distinguished," as required by sec. 10.

In *Re Buckley* (1924), 25 O.W.N. 710, 4 C.B.R. 521, the learned Registrar, Mr. Holmsted, K.C., decided that the description of the locality of goods intended to be conveyed, under the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, sec. 10, is a material part of the description; and, where this was clearly erroneous—if there were no goods of the debtor at the location set out in the mortgage at the time it was executed—the mortgage was inoperative against the goods of the debtor, referring to *Mills v. King* (1864), 14 U.C.C.P. 233; *Hiscott v. Murray* (1862), 12 U.C.C.P. 315; and *Donnelly v. Hall*, *supra*.

I wish to add, although the point was not raised on the argument, that the mortgage as prepared was misleading in so far as the description of the mortgagors is concerned. Annie Brown and M. D. Rankin are described in the mortgage as carrying on business as manufacturers under the name, style, and firm of "Canada Quilting Company." The fact is that at the time this mortgage was given they had not carried on business under any such name either in Toronto or elsewhere. It came out in the evidence that the mortgagors intended to change their name from "Comforter and Cushion Manufacturing Company" to "Canada Quilting Company Limited," a company which they intended to form, but which at that time was not incorporated, and at the time the mortgage was prepared it was agreed between the members of the firm of Comforter and Cushion Manufacturing Company and the mortgagees that the mortgage should be given in the names of Brown and Rankin, carrying on business as Canada Quilting Company, until that company was incorporated. The assets of the mortgagors had not been transferred to the new company, and the solicitor acting for the mortgagees refused to accept a mortgage in the name of the persons carrying on business as the Canada Quilting Company unless a declaration of copartnership was executed and delivered. This was done, and the declaration delivered, but it was never registered.

The Bills of Sale and Chattel Mortgage Act was passed for the purpose of protecting mortgagees and the creditors of the mortgagor, and it seems to me that persons dealing with the mortgagors



under the name of Comforter and Cushion Manufacturing Company might very probably be misled or deceived by the partners of that firm making and executing a mortgage in which they describe themselves as carrying on business under a wholly different name and a name under which, as a matter of fact, they did not carry on business at all; as it is well known that where individuals carry on business under an assumed name it is by that name they are known to the public and not by the names of the individual partners, and that it is the assumed name, and not the names of the individual partners, that gets into the trade records concerning the dealings of the firm. Bradshaw, one of the largest creditors of the debtors, swore that he never heard of the assumed name and knew nothing of the mortgage in question, and there was in the present case nothing to indicate that "Comforter and Cushion Manufacturing Company" was identical with "Canada Quilting Company." I am therefore inclined to think that such a misdescription of the mortgagors was also a fatal defect in the mortgage, but it is not necessary that I should, and I do not now, decide that point. It may be that in order to invalidate a chattel mortgage on such grounds it is necessary to shew a fraudulent intent; and that, as no fraudulent intent has been shewn here, this objection is not fatal to the validity of the mortgage; but it is not necessary further to consider this question, as I have already on another ground determined that the mortgage in question is invalid as against the trustee.

My conclusion is that, on the authorities referred to, there must be a finding that sec. 10 of the Act has not been complied with, and that the mortgage must be declared null and void as against the trustee; the trustee is also entitled to his costs.

J. B. Henderson & Co. Ltd., claimants, appealed from the judgment of FISHER, J.

October 28. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

J. A. Worrell, K.C., and R. H. Sankey, for the appellants, contended that the description of the property in the chattel mortgage was a correct description, and was sufficient to comply with the Bills of Sale and Chattel Mortgage Act. The Judge in Bankruptcy erred in declaring the mortgage inoperative on the ground of misdescription. Reference to *Woollings v. Barr*, 46 O.L.R. 1; *Accountant of Supreme Court of Judicature v. Marcon*, 30 O.R. 135; *Hovey v. Whiting*, 14 Can. S.C.R. 515.

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*H. M. Finkle*, for the trustee in bankruptcy, respondent, relied on the reasons for judgment of Fisher, J., and the authorities cited by him, making reference also to Barron and O'Brien on Chattel Mortgages; 2nd ed., pp. 150, 481, 484; *Adams v. Commercial National Bank of Dubuque* (1880), 53 Iowa 491; *McCall v. Wolff* (1885), 13 Can. S.C.R. 130; *Tapfield v. Hillman* (1843), 6 Man. & G. 245. Counsel pointed out that the chattels mortgaged were never on the premises described in the instrument. The plan of survey produced at the trial shewed that the building in which the goods and chattels actually were was situated at the rear of certain lots on Richmond street and separated from the premises known as 551 Queen street west by a public lane. The description in the chattel mortgage was inapplicable to any building other than that having the street number 551. A building separated by a public lane from No. 551 could not be indicated by the words "in, around, and upon the premises . . . 551." None of the mortgaged chattels having been at any time on the premises No. 551, the mortgage was inoperative as to any chattels in the warehouse where they actually were, just as much so as if they had been in No. 553: see *Re Buckley*, 25 O.W.N. 710, 4 C.B.R. 521. If the description is rejected as incorrect, there is nothing in the mortgage by which to identify the chattels intended to be mortgaged.

November 6. The judgment of the Court was read by LATCHFORD, C.J.:—This is an appeal in bankruptcy proceedings from the judgment of Fisher, J., dated the 1st June, 1925, setting aside a chattel mortgage bearing date the 21st August, 1924, and duly filed in the proper office.

The learned Judge held that the attack on the mortgage as not made in good faith and with intention to prefer the mortgagees, failed. He, however, gave effect to the contention that the description of the mortgaged property was insufficient and declared the mortgage null and void as against the trustee, and that he was therefore entitled to the goods and chattels which the mortgagees had seized. The mortgagees appeal.

The mortgage was made between Annie Brown and Melville Dwight Rankin, manufacturers, of the city of Toronto, carrying on business in the firm name of "The Canada Quilting Company," and J. B. Henderson & Co. Limited. It recites that the mortgagors have applied for advances in goods to be supplied to them upon credit from time to time for the term of 12 months from date, to enable them to carry on their business, and that the mortgagees, on the faith of the security given or to be given, have agreed to make such advances.

Earlier in 1924 the mortgagors had carried on business in co-partnership under the firm name of Comforter and Cushion Manufacturing Company, on premises in the rear of 294 Brunswick avenue. In March of the same year they discontinued operating this factory, and moved several city blocks south-westerly to a warehouse located east of Augusta avenue between Queen street and Richmond street. "The premises," said the mortgagors' manager, "were changed to the rear of 551 Queen street west." No business was carried on elsewhere by the mortgagors. The warehouse stands on the rear of lots fronting on Richmond street, on the south-west corner of the intersection of two lanes, one running west from Augusta avenue and the other northward from Richmond street to Queen street. The south end of the latter lane was closed by a gate, and, according to the evidence, was not used for any purpose relating to the business of the mortgagors. Their factory could be reached through the lane from Richmond street, but the entrance commonly used was on Queen street, immediately east of a barber-shop and billiard-saloon numbered 551. The warehouse bore no street number.

Mr. Worrell asked leave to file an affidavit that a sign was exhibited at the Queen street entrance to the lane, bearing the firm name under which the mortgagors carried on business. In the view which I take, this affidavit is not required for the determination of the appeal, but I see no reason why it should not be admitted in evidence.

The property covered by the mortgage is thus described: "All and singular the goods and chattels particularly mentioned and set forth in the schedule endorsed hereto (or hereunto annexed and marked with the letter A) all of which such goods and chattels are now the property of the said mortgagors and are situate in, around, and upon the premises known as 551 Queen street west."

The schedule referred to is endorsed on the mortgage and covers: "All the stock in trade, raw material and manufactured goods, and all the goods, chattels, and effects now or hereafter in or about the premises 551 Queen street west, Toronto: 1 Garnett machine, 1 picker, and 1 blower, and the accessories of same, and all the tenant's fixtures, the property of the mortgagors, in or about the said premises."

Reading the schedule with the body of the mortgage, the description includes all the goods and chattels which were, on the date of the mortgage, the property of the mortgagors and situated in, around, and (or) upon the premises known as 551 Queen street west. After-acquired property is also included.

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The contention to which effect had been given is that the goods covered by the mortgage were not "in, around, or upon the premises known as 551 Queen street west," and that, therefore, upon the authorities cited by the learned Judge, there is not a sufficient description of the goods and chattels seized by the mortgagees.

Section 10 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, requires that a mortgage like that in question herein "shall contain such sufficient and full description of the goods and chattels that the same may be thereby readily and easily known and distinguished."

There is no evidence that the goods in question herein as described in the mortgage were not the property of the mortgagors, or that they could not have been readily and easily known and distinguished. The ground, and the sole ground, of the decision is that they were not "in, around, or upon the premises known as 551 Queen street west."

It is not suggested that the mortgagors had any property whatever at the barber-shop or billiard-saloon known as number 551, nor that the mortgagees seized any property of the mortgagors situated anywhere except in the factory in rear from Queen street of No. 551.

It was well known that the mortgagors carried on business only in the warehouse mentioned in the rear of 551 Queen street west, and that only was their address stated on the invoices of the goods delivered to them by the mortgagees in conformity with the terms of the mortgage.

The authorities cited in the judgment appealed from do not in my opinion warrant upon the facts the conclusions arrived at.

In *Fraser v. Bank of Toronto*, 19 U.C.R. 381, the mortgage was upon the goods and chattels of two members, McD. and W., of a firm of three partners. The descriptions were "the household furniture in W.'s residence," without specifying the locality of his residence, and "the household furniture and property of McD.," without mention of his residence or of its location. The descriptions were held to be sufficient. The statute in force at the time used the word "efficient" where "sufficient" is now employed. The difference in meaning may not be very great; but, whatever it may be, it does not tend to increase the adequacy of the description now required.

In *Hall v. Carmichael*, 2 A.R. 639, the article alleged to be covered by the mortgage was "one single buggy" without any other description or reference or locality. There was nothing to



afford any means whatever by which the buggy could be identified; and, after a review of nearly all the earlier cases, the description was held insufficient. However, no such principle is laid down in this or in the *Fraser* case as that mention of the correct locality is indispensable.

*Grass v. Austin*, 7 A.R. 511, and *Donnelly v. Hall*, 7 O.R. 581, appear to me to have determined nothing more than that where a mortgagor has property in more than one locality, and the subject-matter of the mortgage is stated to be in one of such localities, only the property in the locality mentioned in the mortgage, and not property which he had in another locality, is covered by the security.

Property moved by a mortgagor from described premises to "any other premises in which the said mortgagor may be carrying on business" was held to have been covered in *Horsfall v. Boisseau* (1894), 21 A.R. 663. *Williams v. Leonard* (1896), 17 P.R. 73 and 26 Can. S.C.R. 406, is nothing to the contrary.

Whether or not a description is sufficient to enable the goods mortgaged to be distinguished within the meaning of the statute is always a question of fact and not of law: *per* Gwynne, J., in his elaborate judgment in *Hovey v. Whiting*, 14 Can. S.C.R. 515, at p. 567.

In the same case (pp. 570, 571) the main object of the statute was stated to be, "to enable unsecured creditors of a debtor and persons having dealings with him or contemplating becoming his creditors to ascertain what part if any of the goods and chattels being in his possession and apparently his own is to any, and if to any to what, extent encumbered by assignment to a stranger or to a preferred creditor so as to be removed wholly or in part from liability to unsecured creditors; in short, to distinguish the encumbered from the unencumbered goods so as to enable them to determine how they shall govern themselves in their dealings with him, namely, whether to continue dealing with him, and trusting him, and giving him credit, or to call in question the assignment, if any, as not being executed in good faith. When all the goods and chattels of a debtor are assigned the occasion for distinguishing that which is assigned from that which is not assigned does not arise, and when such assignment is put on registry in the manner and with the affidavits required by the statute the object and intent of the statute is attained, and the only question open to the unsecured creditors, as it appears to me, is as to the *bona fides* of the instrument."

Having regard to the facts and the objects and intent of the statute, I cannot but regard the description of the goods and

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chattels mortgaged to be full and sufficient. They were all the stock in trade and certain specified machines, the property of the mortgagors, contained in a building in the city of Toronto in the rear of 551 Queen street west. The mortgagors carried on business in no other place, and ingress and egress to and from their factory were ordinarily by means of the lane immediately west of No. 551. While that particular number was not strictly proper to be applied to designate the location of their premises, it was in fact the number and the only number by which the location of their premises was known. No creditor or other person having dealings with the mortgagors was or could be misled by the designation commonly used. The very character of the machines mentioned in the mortgage precluded the possibility of their being in the barber-shop or the billiard-saloon.

I therefore think the appeal should be allowed with costs payable by the trustee.

*Appeal allowed.*

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[APPELLATE DIVISION.]

1924. McLEAN GOLD MINES LTD. V. ATTORNEY-GENERAL FOR ONTARIO.

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*Crown—Forfeiture of Mining Claims for Failure to Pay Taxes Imposed by Mining Tax Act, R.S.O. 1914, ch. 26—Grant of Mining Claims to Another—Difference in Rights Reserved—Action by First Grantees for Possession and to Set aside Forfeiture—Whether Action or Petition of Right the Proper Remedy—New Grantees in Possession—Fatal Omissions and Departures from Requirements of Statute in Procedure of Crown—Curative Provisions of sec. 21, subsecs. 3, 6—“Such Certificate”—Powers and Duties of Minister of Crown—Mining Tax Titles Validity Act, 1924, 14 Geo. V. ch. 22—Lien for Improvements under Mistake of Title.*

The title to certain lands granted by the Crown to M. in 1914 as mining claims had become vested in the plaintiffs. The Crown assumed to forfeit these mining claims for non-payment of taxes imposed by the Mining Tax Act and its amendments, and thereafter new patents were issued to the defendant company, who went into possession and made improvements. The plaintiffs brought this action against the company and the Attorney-General and the Minister of Mines for possession and for a declaration of the invalidity of the proceedings taken for the forfeiture of their lands:—

*Held*, that, if the Crown had not conveyed the lands to a new purchaser and the title had remained in the Crown, the plaintiffs would have been called upon to attack directly the proceedings taken for forfeiture, and so would have been seeking a remedy against the Crown, and must have proceeded by petition of right; but, possession having been taken and the action being for recovery of possession against the subsequent grantees in possession, the proper remedy was by action.

*Esquimalt and Nanaimo Railway Co. v. Wilson*, [1920] A.C. 358, followed.

*Held*, also, that the fact that greater rights were reserved to the Crown by the subsequent grant than those reserved by the grant under which the plaintiffs claimed did not affect the plaintiffs' rights.

*Held*, also, that all statutes providing for forfeiture must be strictly construed, and there cannot be a forfeiture unless the precise provisions of the statute have been complied with: the procedure provided by sec. 21 of the Mining Tax Act not having been followed, and the omissions and departures from the requirements of the statute not being so insignificant as to fall within the *de minimis* rule, the lands had not been effectively forfeited and reverted in the Crown, unless the curative provisions found in subsecs. 3 and 6 of sec. 21 could be applied.

And *held*, that the words "such certificate" in subsec. 6 mean a certificate granted by the Minister after publication of an advertisement (subsec. 3) complying with the provisions of the earlier portions of the statute: the Minister has not the right by a certificate to dispense with the requirements of the statute; it is the duty of the Crown and of every branch of the Executive to abide by and obey the law; and a power given by statute to a Minister cannot be effectively exercised unless the conditions precedent to its exercise have been fulfilled.

*Eastern Trust Co. v. McKenzie Mann & Co. Ltd.*, [1915] A.C. 750, 759, and *Heron v. Lalonde* (1916), 53 Can. S.C.R. 503, applied.

Reference to the Mining Tax Titles Validity Act, 1924, 14 Geo. V. ch. 22, expressly declared not to apply to this action.

*Held*, also, that the defendant company, the subsequent grantees, having acted in good faith, were entitled to a lien on the property for improvements made under mistake of title.

AN action to establish the plaintiffs' ownership of certain mining claims and for other relief.

The action was tried by LENNOX, J., without a jury, at a Toronto sittings.

W. N. Tilley, K.C., and T. A. Beament, K.C., for the plaintiffs.

Glyn Osler, K.C., for the defendants the Attorney-General and the Minister of Mines.

W. R. Smyth, K.C., for the defendants Paymaster Mines Ltd.

October 13, 1924. LENNOX, J.:—The action is for a declaration that the plaintiffs are the owners of mining claims 321 and 322 in the district of Temiskaming; that the forfeitures declared by departmental certificates of the 7th October, 1920, are void; that these claims did not thereby or otherwise become open for location or re-staking; and that the patents subsequently issued by the Crown for these properties are void; also for an order setting aside the patents just referred to, cancelling the same, directing that the registration thereof be vacated, restraining the defendant company from operating the mines, and for the usual order of reference to take an account of profits and damages.

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After a good deal of perambulation, beginning at Ottawa, the action was tried in Toronto.

Looking at the record when it stood for trial at Brampton, and in the absence of counsel for any of the parties, I inclined to the opinion that the plaintiffs' remedy, if any, would be by petition of right. This position was promptly taken by counsel for the defence when the case came on for hearing in Toronto. Further consideration has not led me to a change of opinion. If this is a right conclusion, it effectually bars the plaintiffs' way—for the time being at all events; but the point was not very fully argued, *pro* or *con*, and I think it better to state the conclusion I have reached as to the merits of the plaintiffs' claim, as well. I am of opinion that, in any event, the plaintiffs also fail upon the merits.

In cases of apparent hardship it is sometimes difficult to shut out an unconscious tendency to sympathise with the weaker side, the individual suitor as against a wealthy corporation, and the like. Here the action is against a wealthy corporation and the Crown, and, although brought by a company, the fortune of Archibald McLean (the owner of the bulk of the stock) will be the most affected by the result. But there is not much room here for the play of sympathy, and it would be ill-directed if exercised to the prejudice of the company that acquired the property in good faith, and, while the plaintiff company slept, expended large sums in development of the mines, or of the Crown in good faith endeavouring to protect the public interest and administer the resources of the Province according to law. I know that the pioneer miner is generally portrayed as a picturesque and heroic figure, and in the early days when he carried his kit upon his back, and foraged for food, and the mining field lay thousands of miles beyond the boundaries of civilization, his life-story competently handled—and with reasonable latitude for the play of imagination, of course—was generally interesting, sometimes pathetic, and, unfortunately, as a matter of fact, oftentimes pathetically tragic. And now that the mineral wealth of these two locations is no longer matter of speculation, the career of Archie McLean in the gold fields of Temiskaming—for a time the tentative possessor of an almost fabulous fortune becomes tragic too, if, through the oversight, neglect, or refusal of himself or his associates to pay a paltry tax, he has lost it all; and, as I have already said, I am of opinion that he has.

And I am of opinion, too, that "refusal to pay" is the right interpretation of the attitude of the plaintiff company, that is, that, long before the Department took steps to have the patents declared forfeited and the locations opened for re-staking, the plaintiff com-



pany, if they ever had any faith in them, if they ever held the claims for purposes other than "exploitation," had abandoned hope and determined to pay no more.

The background is of no consequence except perhaps as a key to what the plaintiff company contemplated and failed to accomplish, that is, as I am convinced, to exploit the mine as the manner of so many is. McLean was not the discoverer or patentee of the locations; Haldane Miller was the original patentee, and, by assignment from him and several mesne assignments, they became vested in McLean and ultimately in McLean Gold Mines Ltd., of which McLean retained and has the bulk of the share capital.

Critically and microscopically examined, it is possible after the event to point out that the estimates or calculations of the expenses connected with forfeiture and resale were not absolutely accurate, and, in view of matters discussed at the trial, a technically better method of procedure may be open to the Department in the future, but I find that the statute was substantially complied with and the properties were legally declared forfeited and revested in the Crown.

An action for an accidental injury is not a distinctly analogous case, but it is not, I think, irrelevant to add that nothing complained of as done or omitted prejudiced the plaintiffs, or occasioned non-payment of the Government tax, or the failure to redeem; the company *at that time* would not have paid up in any event. I need not discuss other objections to the plaintiffs' claim.

There will be judgment dismissing the action with costs.

The plaintiffs appealed from the judgment of LENNOX, J.

March 30 and 31 and April 1, 1925. The appeal was heard by LATCHFORD, C.J., MIDDLETON, ORDE, and SMITH, JJ.A.

Tilley, K.C., and Beament, K.C., for the appellants.

Smyth, K.C., for the defendants Paymaster Mines Ltd., respondents.

Glyn Osler, K.C., for the defendants the Attorney-General and the Minister of Mines for Ontario.

November 10. The judgment of the Court was read by MIDDLETON, J.A.:—Appeal by the plaintiffs from the judgment of Mr. Justice Lennox, pronounced on the 13th October, 1924, dismissing the action.

By patents bearing date the 4th February, 1914, certain lands were granted to one Haldane Miller as mining claims. The title of Miller has become vested in the plaintiffs. These mining claims

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were, it is said, forfeited by the Crown for non-payment of taxes imposed by the Mining Tax Act and its amendments, and thereafter new patents were issued to the defendant company.

The regularity of the procedure taken by the Crown, looking to the forfeiture of the lands, is attacked, and numerous defects are suggested. The learned trial Judge dismissed the action, holding that the plaintiffs' only remedy, if the irregularities and improprieties relied upon by them gives them any right, is not by action, but by petition of right, and further that the provisions of the statute were substantially complied with so that the properties in question in the action had become duly forfeited to and revested in the Crown.

After carefully considering the matter, I am of opinion that this judgment cannot be sustained. This is not a case in which it is necessary to invoke the provisions found as numbers 7 and 8 in sec. 26 of the Judicature Act, R.S.O. 1897, ch. 51, continued in force by virtue of the provisions of sec. 3 of the present Act. These clauses give to the Court the right to decree the issue of letters patent to lawful claimants, and the right to repeal and set aside letters patent issued erroneously, or by mistake, improvidently, or through fraud. The exact nature of the jurisdiction thus conferred has been the subject of much discussion and controversy. The history of the legislation and of the decisions upon it may be found in *Farah v. Glen Lake Mining Co.* (1908), 17 O.L.R. 1, and in the more recent case *Fitzpatrick v. The King* (1925), 57 O.L.R. 178. These cases indicate that the effect of the legislation is to continue and effectuate the law as laid down in *Attorney-General v. Vernon* (1684-5), 1 Vern. 277, 370, which established that in the Court of Chancery a bill would lie to set aside a patent which had been issued by the Crown by error, mistake, or fraud, the plaintiff having the right to obtain the patent being deprived of this right and a patent having improperly issued in favour of some one else.

That is not the case here. The plaintiffs have their patent, and they assert that this patent gives to them the ownership of the lands in question, and they seek to recover possession of the lands by virtue of this title. The defendant company contend that, by reason of failure of the plaintiffs to pay taxes, this land became forfeited to the Crown, and the Crown conveyed the land to them, to which the plaintiffs reply that, before their land could be forfeited under the provisions of the statute, certain conditions precedent had to be observed and strictly complied with; and, these not having been observed and complied with, the proceedings looking to the forfeiture were invalid, null, and void.

It is true that this is not the exact form taken by the plead-

ings. The plaintiffs, in the first place, ask not merely for possession, but for a declaration of the invalidity of the proceedings taken for the forfeiture of their land. This appears to me to be immaterial and a matter of form only. If the Crown had not conveyed the land to a new purchaser and the title had still remained in the Crown, the plaintiffs would have been called upon to attack directly the proceedings taken for forfeiture, and so would have been seeking a remedy against the Crown, and must, of necessity, proceed by way of petition of right; but, where possession has been taken and the action is for the recovery of possession of the land as against the person in possession, the proper remedy is by action.

The matter is, I think, concluded by the decision of the Privy Council in *Esquimalt and Nanaimo Railway Co. v. Wilson*, [1920] A.C. 358. There Lord Buckmaster, delivering the judgment of the Judicial Committee, points out (p. 364) that a petition of right is the proper procedure "for the recovery from the Crown of property to which the applicant has a legal or equitable right," and that where the property which is sought to be recovered is in the possession of a third party petition of right is not the appropriate remedy. In that case, as in this, "the claim sought is a declaration not against the Crown, but against grantees from the Crown. . . . The original grant by the Crown to the appellants is perfectly good and remains unassailed except" in so far as the Crown sought to void the original grant and to set it aside to make a new grant, "so that the presence of the Attorney-General is proper and necessary for the determination of justice" (pp. 368, 369).

I do not see that the fact that, in the grant under which the defendant company claim, greater rights are reserved to the Crown than in the grant under which the plaintiffs claim, makes any difference. These matters are not the subject of controversy. Indirectly they may be affected by the judgment. The whole question at issue is the right to the possession of the mining claims.

Turning now to the other branch of the appeal. By the provisions of sec. 21 of the Mining Tax Act, R.S.O. 1914, ch. 26, a procedure is provided by which lands may, by reason of non-payment of taxes, become forfeited and reverted in the Crown. It is elementary that all statutes providing for forfeiture must be strictly construed, and that there cannot be a forfeiture unless the precise provisions of the statute have been complied with. In this case it is plain that the conditions of the statute have not been complied with, and by no judicial charity can it be said that the omissions and departures from the requirements of the statute are so insignificant as to fall within the principle *de minimis*. It seems plain

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that, unless the curative provisions relied upon by the defendants have the effect contended for, the lands have not actually been forfeited to and revested in the Crown. This must have been obvious to the Legislature when the curative Act was passed in 1924, the Mining Tax Titles Validity Act, 1924, 14 Geo. V. ch. 22, but this Act (sec. 3, *sub fin.*) expressly excepts from its operation this pending action.

The curative provisions relied upon are found in subsecs. 3 and 6 of sec. 21 of the Mining Tax Act. Subsection 3 provides that if "after publication of such advertisement" the taxes are not paid, etc., the Minister may by a certificate under his hand and seal of office declare the lands forfeited. Subsection 6 provides that "such certificate" shall be received as evidence in any court and shall be absolute and conclusive evidence of the forfeiture to the Crown of the lands so certified, declared, or recited to have been forfeited.

In my view, the controlling words of subsec. 6 are "*such certificate*," which, carried back to the third clause, mean a certificate granted after publication of an advertisement complying with the provisions of the earlier portions of the statute. It was not, I think, intended to enable an officer of the Crown to dispense with the requirements of the Legislature, or to give to him the right by a certificate to dispense with that which the Legislature in its wisdom had declared to be essential. It may be that the curative Act of 1924 has given to departmental action the effect which it did not theretofore possess; but, in the absence of express statutory authority, the Minister has no power to overrule and dispense with statutory requirements. As put by the Privy Council in *Eastern Trust Co. v. McKenzie Mann & Co. Ltd.*, [1915] A.C. 750, 759, "It is the duty of the Crown and of every branch of the Executive to abide by and obey the law."

The decision of the Supreme Court in *Heron v. Lalonde* (1916), 53 Can. S.C.R. 503, is not without its bearing here. Adapting the language of Idington, J., I am unable to understand how a power given by statute to a Minister, to be exercised upon certain conditions precedent, can be said to have produced anything effective in law when attempted to be exercised without the conditions precedent having been fulfilled.

There is no reason to suppose that the defendant company acted otherwise than in good faith, and apparently much money has been spent upon the land under the mistaken belief that the second patent conferred a good title upon the defendant company. Therefore there is no reason for denying to the defendant company a lien upon the property for improvements made under mistake of title.



The appeal should be allowed with costs, and there should be a declaration that the proceedings towards the forfeiture of the plaintiffs' land for non-payment of taxes are null and void, and that the new grant issued by the Crown is void; and there should be judgment for the plaintiffs for recovery of possession of the land in question; there should be a declaration that the defendant company are entitled to a lien upon the land for the value of improvements made under mistake of title; and there should be a reference to the Master to ascertain the amount of this lien, with proper provisions for a sale of the property in case the plaintiffs do not pay; costs of this reference to be in the discretion of the Master. There is no reason why costs should not follow the event. So the plaintiffs will have their costs as against the defendant company. No order will be made concerning the costs of the Attorney-General or Minister of Mines, and no order will be made against them for payment of costs.

This judgment will not free the plaintiffs from obligation to pay the taxes, and if it is so desired a declaration to that effect may be inserted in the judgment.

*Appeal allowed.*

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[APPELLATE DIVISION.]

TORONTO GENERAL HOSPITAL TRUSTEES v. TOWN OF RENFREW.

1925.

*Municipal Corporations—Liability for Maintenance of Indigent Person in Hospital—Hospitals and Charitable Institutions Act, R.S.O. 1914, ch. 200, sec. 23—Resident—Object and Construction of Act—Married Woman—Change of Residence of Husband.*

Nov. 11.  
Dec. 14.

The Hospital and Charitable Institutions Act was passed for the relief of the poor, its object is largely charitable, and it ought to receive a liberal construction. The intention is that every indigent person who resides in Ontario shall have proper medical treatment, and that, in case of his inability to pay, some municipality in the Province shall be chargeable with his maintenance and treatment in a hospital.

The word "resident," in sec. 23 of the Act, which makes the municipality in which the indigent person is "resident," at the time of his admission to the hospital, liable for the hospital charges, must be construed by reference to the object of the Act.

*Mellish v. Van Norman* (1856), 13 U.C.R. 451, followed.

In the circumstances of this case, where the patient's husband had, three weeks before she was taken to the plaintiffs' hospital in T., abandoned his residence at K., without intention of returning there, and husband and wife had lived during those three weeks at R., whence she was taken to the hospital in T., it was *held*, that the municipality of R. was liable for her maintenance and treatment.

*Regina v. Abingdon Union Guardians* (1870), L.R. 5 Q.B. 406, distinguished.

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ACTION against the Municipal Corporation of the Town of Renfrew to recover \$1,081.50 for maintaining and treating a patient in the plaintiffs' hospital.

The action was tried by WRIGHT, J., without a jury, at a Toronto sittings.

*H. D. Gamble*, K.C., for the plaintiffs.

*A. J. Thomson*, for the defendant corporation.

November 11. WRIGHT, J.:—In this action the plaintiffs claim from the defendant the sum of \$1,081.50 for the maintenance of Isobel Stringer in the plaintiffs' hospital from the 24th February, 1923, to the 14th February, 1925.

At the trial written admissions, which obviate the necessity of deciding a great many questions that would otherwise arise for decision, were filed.

By the evidence and admissions of the parties it is established that Isobel Stringer, wife of David M. Stringer, resided with her husband at Kirkland Lake, where the latter was conducting a jewellery business, until the 28th December, 1921, when she went to her mother's home in the town of Renfrew for the purpose of medical treatment. She was admitted to the Victoria Hospital in the town of Renfrew on the 8th January, 1922, and there remained until the 10th April, 1922, when she returned to her mother's home in Renfrew. She remained there until the 26th June, 1922, when she was again admitted to the Victoria Hospital in the town of Renfrew, and remained in the hospital until the 25th July, 1922. She again returned to her mother's home, and remained there until the 8th August, 1922, when, for a short period, she was a patient in the Carleton General Hospital at Ottawa, for medical treatment. Again she returned to Renfrew and lived with her sister under an arrangement whereby each of them contributed to the maintenance of the household. In her evidence she states that the money for that purpose was supplied by her husband. Her children lived with her at her sister's house.

During all this time, David M. Stringer, her husband, resided at Kirkland Lake, but in October, 1922, he was overtaken by financial difficulties and made an assignment for the benefit of his creditors. He then went to Renfrew and stayed a short time, returning to Kirkland Lake about the 1st November for the purpose of disposing of, or removing, his furniture and his tools.

After leaving Kirkland Lake, he went to Renfrew and lived with his wife and two children at her sister's place until the 24th

November, 1922, when, upon the advice of a medical practitioner, he took his wife to the Toronto General Hospital for treatment.

Mrs. Isobel Stringer was admitted to the hospital on the 24th November, 1922, and thereafter the husband obtained employment in the city of Toronto, and remained there for about one year, when he removed to the city of St. Catharines, where he now resides. Their two children remained with the sister at Renfrew up to some time in 1923.

The plaintiffs, pursuant to subsec. 3 of sec. 23 of the Hospitals and Charitable Institutions Act, R.S.O. 1914, ch. 300, gave the required notice to the defendant municipality, and the latter, pursuant to subsec. 4 of said section, duly notified the plaintiffs that the said Isobel Stringer was not a resident of the Municipality of the Town of Renfrew. On the 4th March, 1923, the plaintiffs rendered to the Municipality of Renfrew an account for \$138 for maintenance of Isobel Stringer for the quarter ending on the 24th February, 1923, and this bill was paid by the municipality on the 3rd April, 1923.

The questions to be decided in this action are:—

(1) Was Isobel Stringer a resident of the town of Renfrew on the 24th November, 1922, the date of her admission to the plaintiffs' hospital, within the meaning of sec. 23\* of the Hospitals and Charitable Institutions Act? (2) Is the defendant estopped from disputing its liability by reason of the payment of the sum of \$138 under the circumstances already mentioned?

In determining the meaning to be assigned to the word "resident," regard must be had to the object of the Act. It is one passed for the relief of the poor, and its object is largely charitable, so that a liberal construction ought to be given. It was manifestly the intention of the Legislature that every indigent person who resides in the Province of Ontario should be entitled to have proper medical treatment, and that in case of his, or her, inability to pay, some municipality in the Province must be chargeable with the treatment.

As already stated, the first question to be determined is, whether or not the town of Renfrew was the residence of Isobel Stringer at the date of her admission to the plaintiffs' hospital.

Chief Justice Robinson in *Mellish v. VanNorman* (1856), 13 U.C.R. 451, at p. 455, states as follows: "The term 'resident' . . . is differently construed . . . according to the

\* 23. The corporation of the municipality in which an indigent person admitted to a hospital receiving aid under this Act is at the time of his admission resident shall be liable to pay to the governing body of the hospital the charges for his treatment. . . .

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purposes for which inquiry is made into the meaning of the term. The sense in which it should be used is controlled by reference to the object." See also *In re Ladouceur v. Salter* (1876), 6 P.R. 305. To the like effect is the judgment in *Re Sturmer and Town of Beaverton* (1911), 24 O.L.R. 65 (see particularly the judgment of the late Chancellor Boyd at p. 74).

The inquiry in this case is, I think, limited to the determination of whether the residence of Isobel Stringer was, at the date (the 24th November, 1922) of her admission to the Toronto General Hospital, Kirkland Lake or the town of Renfrew.

Mr. Thomson, for the defendant, in the course of a very able argument, contended that her residence was Kirkland Lake, and that she had never acquired a residence at the town of Renfrew. He argued that her residence at Renfrew was merely for temporary purposes, and that she never acquired any permanent residence there. It should be mentioned that, according to the evidence, there had been no separation between David M. Stringer and his wife, but that she went to Renfrew solely for the purpose of medical treatment.

I do not think the argument on the part of the defendant can prevail. I quite agree that when Mrs. Isobel Stringer went to the town of Renfrew her stay there was temporary in its nature, and, up to the time her husband left Kirkland Lake, it could not be said that her residence was at the town of Renfrew.

I think, however, it is impossible to hold that when the husband finally left Kirkland Lake, about the 1st November, 1922, sold his furniture, gave up his house, and had no intention of returning to Kirkland Lake, he remained a resident of that place, even if he had not acquired a residence elsewhere.

He lived in Renfrew with his wife for about three weeks, during which time he contributed to the maintenance of the household there, and that place was his residence and that of his wife during that period. It could not be reasonably held that they remained residents of Kirkland Lake. Mr. Thomson cited several authorities under the poor laws in England, but I do not think that any of these are applicable to the circumstances in this case. He relied strongly upon the judgment of Mr. Justice Blackburn in *Regina v. Abingdon Union Guardians* (1870), L.R. 5 Q.B. 406, at p. 409, but I do not see how that case assists his argument, as it plainly assumes that, though the person was physically absent from his residence, he had still an *animus revertendi*, and in that event his residence remained at the former place. The facts of that case are clearly distinguishable from those of the present.

My opinion is, therefore, that the defendant corporation is liable for the maintenance of Isobel Stringer. It appears to be a hard case on the defendant municipality, but there does not appear to be any escape if the objects of the Hospitals and Charitable Institutions Act are to be kept in view.

There will be judgment for the plaintiffs for the amount claimed and costs.

The defendant corporation appealed from the judgment of WRIGHT, J.

December 14. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

*Thomson*, for the appellant. The husband of Isobel Stringer left Kirkland Lake on the 1st November, 1922, and went to Renfrew without any intention of settling there, and so his old residence persisted until he acquired a new one. In another, alternative, view, the husband having come to Toronto on the 24th November, 1922, his residence and that of his wife was Toronto at the time of the wife's admission to the hospital. Reference to the *Abingdon* case, *supra*; *Mitchell v. United States* (1874), 21 Wallace 350; *Regina v. Inhabitants of Tacolnestone* (1849), 12 Q.B. 157; *Regina v. St. Ive's Union* (1872), L.R. 7 Q.B. 467; *Regina v. Worcester Union* (1874), L.R. 9 Q.B. 340; *Manchester (Overseers of) v. Guardians of Ormskirk* (1886), 16 Q.B.D. 723.

*Gamble*, K.C., for the plaintiffs, respondents, was not called upon.

LATCHFORD, C.J., at the conclusion of the argument for the appellants, delivered the judgment of the Court:—However hard it may be on the Municipal Corporation of the Town of Renfrew, there is here no escape from the liability imposed by the statute. A hospital charge is laid on the municipality in which the patient resided at the time of admission. Neither the patient, her husband, nor their children then resided at Kirkland Lake. The husband and wife for three weeks were resident nowhere but in the town of Renfrew. They moved to Toronto on the advice of a Renfrew physician, in order that the wife should have treatment there.

The Legislature in its wisdom has chosen to impose liability, in such cases, on the municipality in which the patient resided *at the time of admission*—in this case Renfrew.

The judgment below is right.

*Appeal dismissed with costs.*

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[LOGIE, J.]

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YOUNG V. CROTEAU.

Nov. 16.

*Contract—Money Lent—Security Given by Deposit of Certificate for Shares in Mining Company—Terms of Agreement—Default of Borrower—Shares to Become Absolute Property of Lender—Conversion and Sale of Shares—Shares Held merely as Security—Implied Power of Sale—Exercise on Notice—Sale Made Bonâ Fide and not Improvident—Right of Borrower to Surplus Shares after Repayment of Loan or to Damages—Interest—Rate of.*

The defendant lent the plaintiff \$1,500 upon the security of a promissory note made by the plaintiff and the transfer of 50,000 shares of the stock of a mining company. The note was not paid at the date of maturity, and the defendant, acting under cl. 4 of the agreement made at the time of the loan, which provided that if the \$1,500 was not repaid at that date the shares should become, at the defendant's option, his absolute property, caused the shares, a certificate for which had been endorsed by the plaintiff in blank, to be transferred to his (the defendant's) own name and afterwards sold:—

*Held*, in an action of trover for the shares, that cl. 4 was invalid to vest the shares absolutely in the defendant—once a mortgage always a mortgage.

The defendant's remedy was a sale, after reasonable notice, under the power of sale which the law implies in a case of this kind.

The sale was made in good faith, without fraud or collusion, and was not improvident; but it was the defendant's duty to stop when he had recouped himself, and he was liable to restore the surplus to the plaintiff or to pay damages.

In the agreement there was a provision for the transfer on the day the note matured of shares in another company, in lieu of interest on the loan. The company was never incorporated, and the agreement in that respect could not be carried out, as the defendant knew. He was *held* entitled to interest at the legal rate.

TROVER for the recovery of shares of a company's capital stock.

November 12. The action and a counterclaim were tried by LOGIE, J., without a jury, at a Toronto sittings.

*J. J. Gray*, for the plaintiff.

*E. G. Black*, for the defendant.

November 16. LOGIE, J.:—The plaintiff sues in trover for the recovery of 50,000 shares of stock of the Holtvrex Gold Mines Limited, alleged to be unlawfully withheld by the defendant. Upon the evidence the facts appear to be as follows:—

The defendant lent to the plaintiff \$1,500 upon a note due on the 15th April, 1925; the plaintiff put up as security 50,000 shares of Holtvrex Gold Mines Limited stock, and for the use of the money was to have transferred to him 5,000 fully paid-up and non-

assessable shares in the Young Davidson Mining Company. This was described by Croteau as a bonus—in reality it was in lieu of interest.

An agreement was entered into as follows:—

“1. The borrower will give to the lender a certificate, fully endorsed, for 50,000 shares of the Holtrex Gold Mines Limited.

“2. The borrower will give to the lender a note due on the 15th day of April, 1925, for the sum of \$1,500.

“3. On the 15th day of April, 1925, the borrower will transfer to the lender 5,000 fully paid-up and non-assessable shares in the Young Davidson Mining Company.

“4. In the event of the borrower not paying to the lender the sum of \$1,500 on the 15th day of April aforesaid, the said shares in the Holtrex Gold Mines Limited shall, at the option of the lender, become the absolute property of the lender.”

On the 15th April, the plaintiff did not pay the note or transfer to the defendant the 5,000 shares in the Young Davidson Mining Company. The Young Davidson Mining Company was not at that time incorporated, is not incorporated at the present time, and there is no certainty that it ever will be incorporated.

On the 17th April the defendant's solicitors wrote to the plaintiff as follows:—

“Mr. Croteau has instructed us to say that unless this matter is cleaned up immediately he will avail himself of the clause in the contract which allows him to dispose of the stock.”

On the 23rd April Croteau put the shares in the Holtrex company, the certificate for which had been endorsed by Young in blank, in his own name, and handed over to a man named Fisher, who was a dealer in unlisted mining stocks in Toronto, some of these shares for sale by him, and the balance some three weeks later.

The defendant told Fisher that he would take 4½ cents a share, which price was obtained.

On the 31st July, the plaintiff tendered to the defendant the amount due him on the note.

At that time 48,000 shares had been sold, and since then the balance.

The writ was issued on the 9th September, 1925.

In acting as he did, the defendant proceeded in good faith upon the mistaken theory that he was the absolute owner of the shares in question by reason of clause 4 of the agreement above set out.

But, the parties now conceding that the whole transaction was a loan secured by the deposit of the Holtrex shares, the defendant

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at the trial offered to account. This was refused by the plaintiff, who stood on his strict rights.

I am of opinion that clause 4 of the agreement is a clog on the equity and is invalid to vest these shares absolutely in the defendant. Once a mortgage always a mortgage: *Salt v. Marquess of Northampton*, [1892] A.C. 1; *Rice v. Noakes & Co.*, [1900] 2 Ch. 445, affirmed in the Lords, *Noakes & Co. Ltd. v. Rice*, [1902] A.C. 24; *Samuel v. Jarrah Timber and Wood Paving Corporation*, [1904] A.C. 323; *Fairclough v. Swan Brewery Co. Ltd.*, [1912] A.C. 565; *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*, [1914] A.C. 25.

This being so, what are the rights of the lender in the event of non-payment?

Had the share-certificate been deposited as security for the debt without a transfer endorsed thereon in blank, the remedy of the lender would be an order for the transfer and foreclosure: *Harrold v. Plenty*, [1901] 2 Ch. 314; *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161.

There being a transfer here, the remedy of the lender would appear to be a sale, after reasonable notice, under the power of sale which the law implies in a case of this kind, where no power is expressly given in the agreement itself: *Carter v. Wake* (1877), 4 Ch. D. 605; *Stubbs v. Slater*, [1910] 1 Ch. 632; *Fraser v. Byas* (1895), 11 Times L.R. 481.

The defendant, in exercising his implied power of sale, was not a trustee except as regards the surplus shares after he had recouped himself, and the Court will not interfere, although the sale is very disadvantageous, if he exercises his power in good faith for the purpose of realising his mortgage-debt, without corruption or collusion with the purchaser, unless the price is so low as in itself to be evidence of fraud: *Warner v. Jacob* (1882), 20 Ch.D. 220; *Had-dington Island Quarry Co. Ltd. v. Huson*, [1911] A.C. 722; *Kaiserhof Hotel Co. v. Zuber* (1912), 46 Can. S.C.R. 651.

The defendant sold at 4½ cents. I cannot, on the evidence, find that he, acting as I have found in good faith as owner or mortgagee, sold improvidently. He thought he was the absolute owner; and, while this may not have been the best price obtainable, he knew of other sales at 3 cents.

The mine was not operating. There were executions in the sheriff's hands, under which—it does not appear whether before or after the sales in question—the sheriff sold all the movables of the Holtvrex company, leaving bare land and apparently an unproved mining claim.

But there is a clear distinction between the price which he was entitled to take as mortgagee and the price he might be held liable for upon a wrongful conversion of the surplus shares after his debt was satisfied.

It was his duty to have stopped when he had recouped himself, and he is liable to restore to the plaintiff so much of the stock as was unnecessary for this purpose, or, if this cannot be done, to pay the plaintiff his proper damages.

And, in this view, the real value of the stock becomes of importance.

As I have said, I can form no accurate opinion on the evidence as to this.

No independent witness was called—not even Fisher, who was in Toronto and could easily have been subpoenaed.

The plaintiff's own evidence must be heavily discounted. In the box he was so enthusiastic a witness that he based his opinion of value upon the problematical completion of a deal involving at least a million, the agreement for which has not been signed—perhaps it never will be.

This true value must, therefore, if the plaintiff wishes it, be the subject of a reference to the Master in Toronto, but at the plaintiff's own risk as to costs.

In the result, I allow the defendant \$1,500 and interest at the legal rate to the 31st July, 1925, or \$1,507.50. I say at the legal rate because the 5,000 shares in the Young Davidson Company, which were the agreed interest, are not *in esse*, and the agreement in this respect is incapable of being enforced specifically.

If these shares were in existence another question might arise: *Singer v. Goldhar* (1924), 55 O.L.R. 267. The defendant therefore gets damages in lieu. This is the legal rate of interest which I have allowed.

The sum of \$1,507.50 represents the sale of 33,500 shares of Holtrex at 4½ cents, leaving 16,500 shares which the plaintiff is entitled to recover in specie.

If the defendant fails to deliver these in 30 days, the plaintiff may have judgment for their value at 4½ cents with interest from the 31st July, if he so desires.

If not, he may have a reference, at his own risk, to fix the value of the shares so converted and not restored in specie.

As to the counterclaim, the defendant knew that he could not get the Young Davidson shares. He knew that they were a bonus

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Logie, J. in lieu of interest, and, if he had been properly advised, would have  
 1925. claimed legal interest, and not the shares themselves.

The counterclaim is dismissed with costs.

YOUNG v. CROTEAU. The defendant will pay the costs of action down to and includ-  
 ing the trial, on the Supreme Court scale.

Further directions and costs of reference (if held) reserved.

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[GRANT, J.]

1925. KNOWLTON v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.

Nov. 18. *Negligence—Street Railway—Injury to Prospective Passenger—Dangerous Place or Trap in Waiting Room—Absence of Light or Guard—Invitation—Reasonable Belief—Action by Husband and Wife for Damages Arising from Wife's Injury—Findings of Jury—Negligence and Contributory Negligence—Damages—Apportionment pursuant to Contributory Negligence Act, 1924—Husband's Damages Reducible—Statement of Jurors after Verdict as to Meaning of Findings—Refusal of Court to Receive.*

The plaintiffs, husband and wife, sued for damages arising from an injury sustained by the wife in the defendants' railway station, alleging negligence on the part of the defendants. The wife, waiting in the station for a car of the defendants, entered a passageway leading from the waiting room, above the entrance to which was a sign bearing the words "Ladies' Toilet." This passageway had three doors leading off it on the left. The first was apparently that of a private office; the second was marked "Ladies' Toilet," but was locked; and the third, a few feet beyond, was standing open. There was no artificial light in the passage, and the daylight was waning, the hour being between 5 and 6 of an October afternoon. The wife, wishing to make use of a toilet room, and supposing that the open door would afford admission into another room of the kind, passed through the doorway and immediately fell down a flight of stairs into the basement below. She was severely injured, and her husband was put to expense and suffered loss of consortium. At the trial, the jury found, in answer to questions, that the defendants were negligent in leaving the door open without guard or light; that the wife had failed to exercise reasonable care, thereby causing or contributing to the accident, in that she entered "a strange, dark place without proper investigation;" that the wife was invited by the defendants to the part of the passageway beyond the locked door, "by the fact that the hall was in no place marked private;" that the "entire amount of damages" suffered by the plaintiffs was \$2,500; that the defendants were 60 per cent. at fault and the wife 40 per cent.; and that the "total damages" suffered by the plaintiffs were, the wife \$1,300 and the husband \$1,200:—

*Held*, that the third doorway was a trap or concealed place of danger, and that it was a place to which the plaintiff might reasonably have been expected to go in the belief, reasonably entertained, that she was entitled or invited to do so.

*Walker v. Midland Railway Co.* (1886), 2 Times L.R. 450, *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, and *Connor v. Cornell* (1925), 57 O.L.R. 35, distinguished.

Thirteen days after the close of the trial, but before the end of the sittings, the jurors presented to the Court a statement to the effect that they had intended by their answers to award the plaintiffs the

full sum of \$2,500, instead of 60 per cent. only of that sum, or \$1,500—i.e., the jurors had fixed on a larger sum and themselves applied the discount:—

*Held*, that the statement could not be received, and that the wife should have judgment for \$780 and the husband for \$720—the husband's damages being subject to reduction, by virtue of the Contributory Negligence Act, 1924, as well as the wife's.

Review of the authorities.

*Masper v. Brown* (1876), 1 C.P.D. 97, and *Winner v. Oakland Township* (1893), 158 Penn. St. 405, 409, 410, specially referred to.

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AN action brought by Jane Knowlton and her husband John F. Knowlton to recover damages arising from injuries sustained by the wife by reason of the alleged negligence of the defendants.

October 13. The action was tried by GRANT, J., and a jury, at Sandwich.

*J. H. Rodd*, K.C., for the plaintiffs.

*R. L. Brackin*, K.C., and *E. H. Furlong*, for the defendants.

November 18. GRANT, J.:—This is an action for damages for injuries sustained by the plaintiff Jane Knowlton in consequence of a fall down a stairway in the waiting room of the street railway station at the corner of Ferry and Sandwich streets in the city of Windsor.

The plaintiff John F. Knowlton is the husband of his co-plaintiff, and claims damages for the loss sustained by him by reason of the injuries suffered by his wife.

The defendant Commission operates—and did on the 25th October, 1924, the date upon which the accident happened, operate—the street railway in the city of Windsor.

The plaintiff Jane Knowlton, while waiting for a street car on the defendants' line, entered the waiting room of the station provided by the defendants for the use of their passengers, actual or prospective. While waiting in the waiting room, and desiring to make use of the "ladies' toilet" room, she entered into the passageway or hallway leading from the waiting room, above the entrance to which was a sign bearing the words "Ladies' Toilet." This passageway had three doors leading off it to the left, the first one apparently going into a private office occupied by railway officials or clerks, the second door into a ladies' toilet room, and the third door leading to a stairway to the basement. The door from the hallway to the ladies' toilet room was fastened, and the third door, a few feet beyond, was standing open. Although there was the necessary electric lamp suspended from the ceiling of this hall or passageway, the evidence is that this lamp was not lighted.

The plaintiff Jane Knowlton, seeing the third door standing open, and (according to her evidence) supposing it was the door—

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way into another toilet room, entered the door and almost immediately fell from the stairway to the cement floor of the basement and sustained severe injuries.

The female plaintiff claims damages for the personal injuries sustained, and her co-plaintiff, the husband, claims damages for the expense to which he was put and the loss which he sustained by being deprived of the services and consortium of his wife.

The defendants deny any negligence on their part and allege that their premises were well and sufficiently lighted at the time of the accident; that the female plaintiff was a trespasser upon their premises; and that her injuries were wholly caused by her own negligence, in that she deliberately passed the doorway leading to the ladies' toilet and wilfully and recklessly entered the doorway leading to the basement.

Questions were submitted to the jury, who found that the defendants had been guilty of negligence, and that such negligence consisted in their leaving the door open without guard or light. The jury also found that the plaintiff Jane Knowlton had failed to exercise reasonable care, thereby causing or contributing to the accident, in that she entered "a strange, dark place without proper investigation."

To my question asking the entire amount of damage suffered by the plaintiffs, the jury answered "\$2,500." In answer to the question as to the degrees of fault on the part of the defendants and the plaintiff Jane Knowlton respectively, the jury found that the defendants' degree of fault was 60 per cent. and that of the plaintiff 40 per cent.\* In answer to a further question as to the total damages suffered by the plaintiffs, the jury allotted to the plaintiff Jane Knowlton \$1,300 and to her husband John F. Knowlton \$1,200.

At the close of the plaintiffs' case, counsel for the defendants moved for a nonsuit, upon the ground that there was no evidence of negligence on the part of the defendants. I reserved the question of nonsuit and directed that the defendants should put in their evidence if they intended to adduce any. The defendants did not

\* Section 3 of the Contributory Negligence Act, 1924, 14 Geo. V. ch. 32, reads as follows:—

3. In any action . . . for damages hereafter brought, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury . . . shall find:—

First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

Secondly: The degree in which each party was in fault and the manner in which the damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.



put in any evidence, and I left the case to the jury, submitting questions to them, and further reserving the question of nonsuit.

The questions submitted to the jury with their answers are as follows:—

“1. Was the female plaintiff's injury caused by the negligence of the defendants? A. Yes.

“2. If so, in what did the defendants' negligence consist? Answer fully. A. By leaving door open without guard or light.

“3. Did the female plaintiff fail to exercise reasonable care, causing or contributing to the accident? A. Yes.

“4. If so, what did she do or omit to do in which she failed to exercise reasonable care? A. In entering a strange, dark place without proper investigation.

“5. Was the female plaintiff invited by the defendants to any part of the hallway shewn in the photographs beyond the lighted door on which is the name “Ladies' Toilet?” A. Yes.

“6. If so, what constituted the invitation? A. By the fact that the hall was in no place marked private.

“7. If you find the female plaintiff failed to exercise reasonable care, what is the entire amount of damages suffered by the plaintiffs? A. Two thousand five hundred (\$2,500).

“8. In what degree were the defendants at fault? A. 60 per cent. In what degree was the female plaintiff at fault? A. 40 per cent.

“9. What are the total damages suffered by plaintiffs? A. Jane Knowlton, \$1,300; John F. Knowlton, \$1,200.”

When the jury brought in their answers to the questions, I read the questions and answers to counsel, and asked if either counsel wished any further explanation from the jury, to which counsel replied that they did not.

Some two or three days after the conclusion of the trial, and while I was still engaged at the assizes, counsel for the plaintiffs informed me that the jury appeared to have misunderstood the questions in regard to the total damages, and stated that the jury meant to be understood that in fixing the total damages of \$2,500, they were making allowance for a reduction or a lessening of the damages by reason of the contributory negligence of the female plaintiff. Subsequently counsel for the plaintiffs handed in a type-written declaration purporting to be signed by jurors and bearing date the 26th day of October, 1925, by which it was declared that the intention of the jury had been that, notwithstanding the fault of the female plaintiff, the damages to be paid by the defendants were to be \$2,500 net to the plaintiffs. “If our verdict in answer to question number 7 deprives the plaintiffs of that sum, in answering that question in the way we did we misunderstood the question

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and its effect." Attached to the declaration is a typewritten copy of the questions and answers, and also an affidavit as to their signatures made by Mr. Roy Rodd and dated the 30th day of October, 1925. It will be noted that the declaration was dated the 26th October and the affidavit of execution sworn on the 30th October, whereas the trial took place on the 13th October and was finished on that day. Thirteen days had therefore elapsed between the day on which the verdict was given and the day upon which the declaration was signed.

Three questions remain to be decided: (1) the motion for nonsuit; (2) the amount of damages in view of the declaration subsequently made by the members of the jury; and (3) whether or not the amount allotted by the jury to the husband John F. Knowlton is to be reduced by 40 per cent. by reason of the contributory negligence of the female plaintiff.

In case the motion for nonsuit were allowed, the other questions would not require solution; I will therefore deal first with the motion for nonsuit.

Counsel for the defendants, on the argument of the motion for nonsuit, referred me to the case of *Connor v. Cornell*, decided on the 20th day of March, 1925, by the Second Divisional Court, and reported in 57 O.L.R. 35; the judgment of the Court being delivered by Middleton, J.A. The principle underlying that decision is that, although an invitee would be entitled to recover damages for injuries sustained by reason of an unusual danger unknown to him, yet "the liability of the occupier" (of the premises) "is only commensurate with the extent of the invitation." The defendants contend in the case at bar that the female plaintiff was an invitee to the waiting room and to the toilet room only, and that she was not an invitee to that part of the defendants' premises in entering which she fell and suffered injury.

In order that the principles of law may be applied intelligently, it will be necessary briefly to state the circumstances of the case. The female plaintiff, living with her husband and two children at 721 Moy avenue, Windsor, on the 25th October, 1924, desired to take the Erie street car of the defendant Commission for the purpose of returning home. A young girl, Clara Gough, and the plaintiffs' youngest boy, seventeen years of age, were with her at the time they entered the waiting room provided by the defendant Commission. The female plaintiff, desiring to adjust her underwear or something of that kind, looked about the waiting room for the ladies' toilet. As appears by certain exhibits which are filed—more particularly exhibit 3, which is a photograph—there is an opening

into a hallway or passageway leading from one corner of the waiting room. On the left hand side of the opening into this hall or passageway, and at a height of probably seven feet from the floor, there is a notice or sign "Ladies' Toilet." This sign and the entrance to the hall from the waiting room are clearly shewn on the photograph, exhibit 3. By this exhibit, it is also seen quite readily that there is or was no door at the entrance from the waiting room into the hallway or passageway. The female plaintiff entered this passageway, looking for the toilet room. On cross-examination Mrs. Knowlton stated that when she went into the waiting room it was between five and six p.m., and it is to be remembered that this was on the 25th October. She stated further that there was no light in the passageway, which statement was corroborated by her son Cuthbert Knowlton and the girl Clara Gough (14 years of age), both of whom stated that some man turned on the light after Mrs. Knowlton had fallen into the basement. The evidence generally was to the effect that the passageway was, if not in darkness, not sufficiently lighted at this time to enable a person to see at all clearly; and the uncontradicted evidence is that the men who assisted in getting Mrs. Knowlton up from the basement floor turned on the light in the basement stairway to enable them to see what they were doing. In this connection it should be mentioned that, as appears by exhibit 3, there is a window in the right hand wall of the passageway and about opposite to the door in the ladies' toilet, but apparently at this time of the evening on the 25th October there was not sufficient light from the window to make the passageway clear.

Having entered the passageway with the girl Clara Gough, the latter tried the door of the ladies' toilet, which door is shewn on the photograph, exhibit 4, and found the door locked. Farther along the same passageway another door stood open and turned back against the end wall of the passage. The female plaintiff states that when they found that the door of the ladies' toilet resisted an effort to open it she stood there, and then saw the other door standing open. She did not see any sign on the open door to shew whether it was another toilet room or not. It was approximately seven feet from the centre of the ladies' toilet door to the centre of the open doorway. This would mean that from the side of one door to the nearer side of the other would be between three and four feet.

Having been prevented from going in at the door marked "Ladies' Toilet," behind which there was a light, and seeing the other door near at hand and standing open, the female plaintiff

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stepped into the open doorway, intending to adjust her underwear there, as she was in a hurry to go home, and when she stepped within the door her foot went down apparently on the first step of the basement stairway, and she fell forward to the cement floor of the basement.

The defendants contend that Mrs. Knowlton, although an invitee in so far as the waiting room and the ladies' toilet are concerned, was not an invitee upon that portion of their premises upon which she received injury, and that as to the portion of the passageway lying beyond the door of the ladies' toilet and as to the open door to the cellarway she was a trespasser.

In *Connor v. Cornell* (*supra*) the defendant was the owner of a produce warehouse in Windsor. The plaintiff entered the defendant's premises for the purpose of purchasing apples. It was conceded that the plaintiff was an invitee, and that an open trap-door (down which he fell) was unguarded and in a poorly lighted part of the warehouse, and constituted an unusual danger unknown to the plaintiff, so that had the plaintiff been an invitee to that part of the warehouse where the trap-door was located he would have been entitled to recover, upon the principle laid down in *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311. The facts in that case upon which the judgment of the Divisional Court was based were the following. The plaintiff, having entered the warehouse, going in a southerly direction, passed the office on the left hand; on his right, extending a considerable distance back, was a large quantity of apples. No one apparently was in the office at the time, but the defendant was at the extreme south end of the building and had a lantern. He called to the plaintiff asking what he would have, to which the plaintiff replied "Apples." The defendant pointed to the place and said, "There they are, I will be with you in a minute." The plaintiff looked at the apples, but, observing onions to the rear of the warehouse near the trap-door, he passed, without further invitation, to the place where the onions were stored and fell into the trap. The distance travelled from the apples was more than 20 feet. The judgment states that, inasmuch as the plaintiff sought to purchase apples only, the defendant invited him to remain where the apples were, and so the invitation was limited, and further that if the plaintiff had indicated his intention to roam over the warehouse at large the defendant would have had an opportunity of warning him of the danger of the trap-door. The invitation to the plaintiff being limited as above, and not being an invitation to go to the part of the warehouse where the onions were and where the trap-door constituted an unknown and



unusual danger, having gone there and having fallen through the trap-door, the plaintiff could not recover against the defendant. Reference is made to *Walker v. Midland Railway Co.* (1886), 2 Times L.R. 450, and *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, as authorities enunciating the principle that the "liability of the occupier is only commensurate with the extent of the invitation."

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In *Walker v. Midland Railway Co.*, on p. 451, the following statement is made in the judgment of the majority of the House of Lords delivered by the Earl of Selborne. The plaintiff in that case was a guest at an hotel of the railway company, and fell down the well of a lift in a service-room. Referring to the duty of an inn-keeper to take proper care for the safety of his guests, and stating that it is impossible to hold that this general duty extends to every room in his house at all hours of the night or day irrespective of the question whether any such guest may have a right or some reasonable cause to be there, his Lordship uses these words: "The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so." The well in question was for a luggage-lift at the farther end of a service-room which had a door opening into a corridor on the third floor close to the sleeping apartments for guests, one of which apartments, nearly opposite to the service-room, was occupied by the plaintiff and her husband (the deceased). The door of the service-room was shut; the well, which was seventeen feet from the door, had been left unfastened; the hour was about three hours or more after midnight, and the light in the service-room was extinguished. The evidence was to the effect that guests had never been known to go into that room at all. The evidence was further to the effect that the deceased had been taking (during the evening) liquid refreshment, which it was stated was not sufficient to make him incapable of taking reasonable care of himself, but enough to make the absence of such care on his part less improbable than it might have been under other circumstances. When in his own room, he asked his wife where the water-closet was, but without waiting for an answer he went out into the corridor where the gas-lights were turned down, so that there was some but not a clear light. There were water-closets off the same corridor properly lighted, and having the letters "W.C." legible upon them, which the deceased might have seen when passing to and from his room in the ordinary course. What the deceased did was to open the door of the service-room, the first door he came to on crossing the cor-



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ridor towards the left. There was no light inside that door. On opening the door it was apparent that the room was absolutely dark. The deceased, instead of looking along the corridor for a water-closet, properly lighted, went into this dark room. He made his way through the darkness to the further end and there "met the danger which cost him his life." It is to be noted that two of the Law Lords dissent from the majority judgment, in which two others concurred.

In *Mersey Docks and Harbour Board v. Procter (supra)*, Viscount Cave, L.C., [1923], A.C. at p. 260, expressed approval of the statement of the law contained in *Walker v. Midland Railway Co.*, above quoted: "In dealing with the first question, it is important to bear in mind the exact nature of the appellants' duty to the deceased. It was not to give him absolute protection in whatever part of the appellants' premises he might be found, but only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation; and this duty must be limited, as Lord Selborne pointed out in *Walker v. Midland Railway Co.*, to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so." It is not necessary to refer particularly to the facts of the *Mersey Docks* case, nor to deal with it further than to point out that the duty of the defendants toward the plaintiff is limited to those places to which the plaintiff might reasonably be expected to go in the belief, reasonably entertained, that she was entitled or invited to do so.

The female plaintiff was admittedly an invitee in the waiting room and to the ladies' toilet; of necessity she was an invitee to the passageway leading to the ladies' toilet. At the entrance to that passageway is a sign informing her that the ladies' toilet was to be reached through or by means of the passageway. The passageway was not at that time lighted artificially, nor, according to the evidence, was the natural light through the window or otherwise sufficient to enable Mrs. Knowlton to see clearly in the passageway. She sees a door on the left hand side, behind which is a light which shews on the frosted glass of the door the words "Ladies' Toilet," but this door, when she tries to open it, is found to be fastened, and the toilet room apparently occupied. A few feet beyond and on the same side of the passageway a door is standing open, and, according to her evidence, in the semi-darkness of the passage, no sign or notice could be seen on the door to indicate whether or not it was another toilet room. The door being open, although the place within the door was in darkness, and being, as it was, in close

proximity to the lighted door of what was apparently a toilet room, although the further doorway was in darkness, she assumed that it was another toilet room or place in which she could in privacy adjust her underclothing, and she stepped within, falling and sustaining injuries.

The question therefore is: Was the female plaintiff, in the sense contemplated by the definition of the law above quoted, an invitee to the place where she received her injury or the place of danger? In other words, was the doorway at the end of the hall or passageway "a place to which the plaintiff might reasonably have been expected to go in the belief, reasonably entertained, that she was entitled or invited to do so?" In my judgment, the answer should be in the affirmative.

As will have been noted before, I submitted to the jury two questions in regard to the matter of invitation, not with any intention of being concluded by their answers to those questions, which had to be dealt with by myself on the motion for nonsuit, but in order that I might have the benefit of their view upon the point. To the question, "What constituted the invitation?" the jury answered: "By the fact that the hall was in no place marked private." In the light of the evidence given at the trial, I take this answer to mean that, inasmuch as the entrance to the passageway was advertised by the words at the top thereof "Ladies' Toilet," and that the doorway into which the plaintiff entered and which was standing open, and was situated within a very few feet of the closed door marked "Ladies' Toilet"—there being no sign upon the open door which would indicate that it was not for the use of passengers, or, as the jury expresses it, was not marked "private"—that all these circumstances, as disclosed by the evidence before them, in the jury's mind justified the female plaintiff in supposing that she was entitled to go where she went. It is true that they find her to have been guilty of contributory negligence in that she entered "a strange, dark place without proper investigation," but her doing so, while it was stated to be contributory negligence, did not, in the jury's mind or in my own, relieve the defendants from the consequences of their own negligence.

The case at bar is to my mind readily distinguished upon the facts from the case of *Connor v. Cornell* and the English cases therein cited. In *Connor v. Cornell* the plaintiff was an invitee clearly to one part only of the warehouse, namely, the part where the apples were stored, and the brief conversation which took place between the plaintiff and the defendant limited the invitation to that locality, and the liability was commensurate with the extent of

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the invitation. In the case at bar, as it appears to me, the clear invitation given to the female plaintiff by the sign "Ladies' Toilet" before the entrance to the passageway, was an invitation to the passageway, and the mere fact that one door leading off that passageway, which was also marked "Ladies' Toilet," was found to be closed and fastened, was no conclusive evidence or even indication to the plaintiff that the invitation was limited to the toilet room behind the closed door, and did not extend to the open doorway two or three feet beyond. So, also, the mere fact that the room within the open door was not lighted might quite reasonably fail to indicate to the plaintiff that she was not invited to go there as to another toilet room, as the hall or passageway itself was not lighted, and she might, I think, not unreasonably suppose that the light was merely waiting to be turned on, the hour being between 5 and 6 o'clock and night approaching.

Under all the circumstances, it appears to me that there was in this case extended to the plaintiff an invitation to that portion of the defendants' premises in which a hidden and unusual danger lay. It seems to me that if the defendants did not intend their female passengers, who are invited into the hallway for the use of the defendants' toilet room, also to make use of the place where the plaintiff was injured, they should have taken care to see either that the doorway to the basement stairs was kept closed, by a spring or otherwise, or (perhaps and) the passageway properly lighted.

The motion for nonsuit must therefore be dismissed.

Dealing with the matter of the declaration subsequently submitted by the jury to the effect that they had intended in allowing damages of \$2,500 thereby to penalise the plaintiffs, or, to put it in other words, that they had already reduced the amount of damages, having in mind the female plaintiff's contributory negligence, I find myself unable to give any effect to the declaration handed to me.

In the first place, by question 7 the jury were asked, "If you find the female plaintiff failed to exercise reasonable care, what is the *entire amount* of damages suffered by the plaintiffs?" to which they replied, "\$2,500." Then by question 9 I asked them again what were the total damages suffered by the plaintiffs Jane Knowlton and John F. Knowlton? They replied "\$1,300 and \$1,200" respectively. Taken together, it appears to me that the questions and answers could not readily be misunderstood. However that may be, it seems to me that it would be quite impossible, after the lapse of thirteen days or indeed any considerable time from the giving of their verdict and their being discharged, that a jury should be allowed to come back and say that they had not under-



stood the questions or that their answers were to be changed. The grave danger of a miscarriage of justice from tampering with jurors or influence being brought to bear upon them would seem to me to make it quite out of the question that anything of this kind should be permitted. I do not for a moment suggest that anything of an improper nature took place in the present case—on the contrary, I have every reason to think that nothing of the kind did occur—but it would seem to me contrary to any proper policy that such changes in the answers to questions submitted to the jury should be permitted, especially after the lapse of time which took place in this case. The declaration presented to me is placed among the papers, and in case of appeal can be considered by a Divisional Court.

My conclusion, after a careful study of such authorities as I have been able to find bearing upon the matter, is that the whole amount of \$2,500 allowed by the jury as damages must be subjected to the discount. In other words, the damages to be allowed to the plaintiffs must be limited to 60 per cent. of \$2,500, namely \$1,500. This sum of \$1,500 is to be divided between the female plaintiff and her husband in the proportions of 13 to 12, making the judgment for the female plaintiff \$780, and that for the plaintiff John F. Knowlton \$720.

There are three leading classes of cases in which a person other than the individual who has suffered the injury resulting from negligence or tort may have a right of action against the person who has been negligent or who has committed the tort. The three principal classes are: (1) the case of a husband for an injury caused to his wife whereby he has been put to expense and loss of her consortium; (2) the case of a master who has been deprived of the services of his servant; and (3) the case of a parent who has been deprived of the services of his child (by injury to or seduction of the latter). These cases are all governed in many respects by the same legal principles: *Admiralty Commissioners v. S.S. Amerika* (H. L.), [1917] A.C. 38 (the judgment of Lord Parker at the bottom of p. 44 and the top of p. 45).

In Singleton's Law of Negligence (1903), p. 123, I find the following language used in regard to the matter of contributory negligence: "If the proximate cause of the injury is the want of reasonable care on both sides A cannot sue B. The fact is, in this case it is not true for A to say he has been injured by B's negligence; he can only say he has been injured by B's negligence in addition to his own negligence, and that unless these two circumstances had combined, he would not have met with his injury. A

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cannot shew that his injury is attributable to B's negligence, and cannot therefore make good his case against B." And (p. 125), quoting from the judgment of Bowen, L.J., in *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685, at p. 694: "Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause."

Sir Frederick Pollock, in the 12th edition of his work on the Law of Torts, p. 464, quoting from a judgment of Lord Blackburn, uses these words: "The received and usual way of directing a jury . . . is to say that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence, he cannot recover." Then, at the bottom of p. 465, the author uses the following words, also containing a quotation from a decision in *Tuff v. Warman* (1858), 5 C.B.N.S. 573, at p. 585: "In the considered judgment on appeal it is said that the proper question for the jury is 'whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened.'"

In an American treatise on the law of contributory negligence by Charles Fisk Beach, 3rd ed., p. 146 (latter part of sec. 103), application is made of the rules regarding contributory negligence and its effect upon the rights of action in cases where there are three parties, such as in the case at bar, although the illustration used is one of principal and agent or master and servant; and the author states that where there is identification of the third person with the plaintiff—that is where the third person was guilty of contributory negligence—such negligence must be imputed to the plaintiff.

As the matter appears to me, under the law as it stood before the passing of the Contributory Negligence Act in 1924, the female plaintiff would clearly have been debarred from recovery upon the findings of the jury, and her right to recover 60 per cent. of the damages found for her is based upon the provisions of the statute mentioned. In view of the principles I have quoted and their application and effect, it seems to me clear that the husband John F. Knowlton, under the law as it stood before the passing of the statute mentioned, could not have recovered any damages for his out-of-pocket expenses or loss of consortium. The injuries sustained by his wife and causing the damage suffered by him were

due in part at least to the negligence of his wife and would not have been suffered had his wife not been negligent, because had it not been for her own want of care the accident would not have happened, and therefore the action by the husband prior to the passing of the statute must have suffered the same fate as an action by the wife brought at that time, that is, have been dismissed.

In his judgment in *The Bernina* (2) (1887), 12 P.D. 58, Lord Esher, M.R., pp. 61 and 62, sets out eight concise rules governing liability for negligence, two of which I quote, namely 7 and 8:—

“(7.) If, although the plaintiff has not been personally guilty of negligence, his servants have been guilty of negligence which has partly directly caused the accident, the plaintiff cannot maintain an action against any one. (8.) If, although the defendant or his servants has or have been guilty of negligence, the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against any one.”

In Mayne's treatise on Damages, 9th ed., p. 70 (the middle of the page), the following statement is made: “Where the person who contributes by his negligence to the injury is not the complainant, but his servant or agent, the former is of course unable to recover. A gentleman whose drunken coachman brings about an accident which he might have avoided, could not himself recover.” A reference is given to the judgment of Lord Esher, M.R., above quoted.

As will be seen from references above given, the cases of husband and wife and master and servant and parent and child are substantially the same in regard to the question involved in the present case.

The only reported case which I have found in which the exact question now under consideration came up for decision was a case in the Pennsylvania Courts, *Winner v. Oakland Township* (1893), 158 Penn. St. 405, at pp. 409-10. In that case, the wife having been found guilty of contributory negligence, the Court held that the husband could not recover consequential damages in respect of her injuries.

The case of *Masper v. Brown* (1876), 1 C.P.D. 97, is of interest as indicating the view entertained by the Court of a state of facts somewhat analogous to the present. The defendant assaulted the female plaintiff, and for such assault was fined by the Justices under a certain statute, and paid the fine. Under sec. 45 of the statute in question, it was provided that where the defendant shall have paid the whole amount adjudged to be paid or shall have suffered the imprisonment, “in every such case he shall be

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released from further or other proceedings, civil or criminal, for the same cause." The husband entered action against the defendant for consequential damage done to himself by reason of the assault on his wife. Counsel for the plaintiff contended that "cause" in the section meant cause of action, and that the husband's cause of action was not the assault *per se* but the consequential damage arising from the assault. The Court (Lord Coleridge, C.J., and Denman and Lindley, JJ.) held that the cause was the assault. Lord Coleridge states—after referring to another statute in *pari materiâ*—that in effect the legislature could not have intended a conviction to be only a bar to proceedings for the same cause of action and consequently that the party should be left open to proceedings by as many persons as might stand in such a relation to the persons assaulted as to entitle them to maintain an action for consequential injuries resulting from the assault, as, for instance, a husband or master—recognising that the claims of the husband in respect of injury to his wife and the master in respect of injury to his servant are in similar positions.

My conclusion, therefore, upon the authorities, is as above stated, that the amount awarded to the husband John F. Knowlton, as well as the amount awarded to the female plaintiff, must be reduced.

There will therefore be judgment for Jane Knowlton in the sum of \$780 and for John F. Knowlton in the sum of \$720, with costs of the action.

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[APPELLATE DIVISION.]

FLANAGAN V. CHAPMAN.

1925.  
Nov. 19.

*Principal and Agent—Agent's Commission on Sale of Land—Agreement for—Commission Payable out of "First Down-payment"—Sale not Carried out by Purchaser—Forfeiture of Sale-deposit.*

The defendant agreed with the plaintiff, a land agent, that if he should sell her land he should "receive 5 per cent. of the purchase-price . . . to be paid to the agent from the first down-payment." The plaintiff brought about a sale, and on the 30th August, 1924, a contract of sale was made between B., the purchaser, and the defendant, for a sale at \$10,000, payable as follows: "\$200 on this date as a covenant promise and agree to pay \$2,800 on completion of deal to be not later than 1st of October, 1924, the balance . . . to be secured by a mortgage. . . . Time to be of the essence. . . . Failure to complete . . . on the date stipulated and pay over money shall give vendor right to rescind and forfeit deposit." The \$200 was paid, but not the \$2,800; B. declined to complete the contract, and the defendant rescinded:—

*Held*, that the plaintiff was not entitled to recover the \$500 commission nor to receive the \$200.

*Per RIDDELL, J.*—The sale fell through without the fault of the defendant, and the commission was not to be paid except from the "first down-payment," and the \$200, the only money paid, was forfeited to the defendant.

*Fletcher v. Campbell* (1913), 29 O.L.R. 501, applied.

*Per MIDDLETON and MASTEN, J.J.A.*—The commission was to be paid from "the first down-payment," and not otherwise. The \$200 was strictly a sale-deposit; and, forfeiture having taken place, the sale-deposit never became a part-payment of the purchase-money, but became the defendant's property.

*Howe v. Smith* (1884), 27 Ch. D. 89, approved in *Sprague v. Booth*, [1909] A.C. 576, applied.

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AN appeal by the defendant from the judgment of the County Court of the County of Welland in favour of the plaintiff for the recovery of \$500 commission on a sale of land by the plaintiff for the defendant.

November 3. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

*T. F. Forestell* and *O. E. Lennox*, for the appellant.

*H. A. Rose*, for the plaintiff, respondent.

November 19. RIDDELL, J.A.:—The defendant on the 1st April, 1924, listed her property, 25 acres of land in the township of Bertie, with the plaintiff, a real estate agent, at \$400 per acre, agreeing with the plaintiff, if he should sell it, that he should "receive 5 per cent. of the purchase-price; said 5 per cent. is to be paid to the agent . . . from the first down-payment." On the 30th August, the plaintiff having succeeded in effecting a sale, a contract of sale was entered into with one B. for the sale at \$10,000, payable as follows: "\$200 on this date as a covenant promise and agree to pay \$2,800 on completion of deal to be not later than 1st of October, 1924, the balance of \$7,000 to be secured by a mortgage. . . . Time to be of the essence of this agreement. . . . Failure to complete this transaction on the date stipulated and pay over money shall give vendor right to rescind and forfeit deposit."

The \$200 was paid, but not the \$2,800; the purchaser, B., declined to complete the contract, and the defendant rescinds.

The plaintiff sued for the \$500 and was awarded it, and the defendant appeals.

Such a contract for the payment of commission as this is, of course, introduced by the agent to secure the payment of his fees as early as possible and out of the first available money. But it has another effect which sometimes tells against the agent—the commission is not to be paid except from the "first down-payment," unless indeed the vendor substitutes something else for



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the "first down-payment," as in *Cross v. Wood* (1921), 50 O.L.R. 15.

The present case is wholly covered by *Fletcher v. Campbell* (1913), 29 O.L.R. 501, in which (at p. 507) the law is thus laid down:—

"Where the only agreement for payment of an agent's commission contains the term that it is to be paid out of the purchase-money, the agent cannot recover if the sale falls through without the fault of his employer, and the only money the employer or agent receives on the purchase is the deposit, which falls to be forfeited."

The present case may be considered even stronger against the agent than *Fletcher v. Campbell*: the \$200 is given "as a covenant promise and agree to pay \$2,800 on completion of deal," and a specific right is given to forfeit it if the transaction is not carried out.

I would allow the appeal and dismiss the action with costs of appeal and action.

LATCHFORD, C.J.:—I agree in the result.

MIDDLETON, J.A.:—I arrive at the same conclusion as my brother Riddell by a somewhat different route. I agree with my learned brother that the plaintiff cannot recover the \$500 sued for, because by the terms of the contract the commission is to be paid from "the first down-payment," and not otherwise.

I also agree with my learned brother that the plaintiff is not entitled to receive the \$200, because this was, I think, strictly a sale-deposit, as that term is defined in the case of *Howe v. Smith* (1884), 27 Ch.D. 89, a decision which has the approval of the Privy Council in *Sprague v. Booth*, [1909] A.C. 576. The deposit, if the contract had been carried out, would have become a part-payment of the purchase-money, and then might have been resorted to by the plaintiff to answer his claim for commission; but the contract was one providing for forfeiture of this deposit; and, the forfeiture having taken place, the sale-deposit never became a part-payment of the purchase-money, but became the defendant's property, for it was a guaranty for the performance of the contract, and upon the purchaser's default the plaintiff took it as an indemnity or solatium for the loss of the bargain.

For these reasons, I agree that the appeal should be allowed and the action dismissed with costs.

MASTEN, J.A.:—I agree with my brother Middleton.

*Appeal allowed.*

## [APPELLATE DIVISION.]

MCBRIDE V. ONTARIO JOCKEY CLUB LTD.

1925.

Nov. 20.

*Company—Public Company Incorporated under Ontario Companies Act—Transfer of Shares—Restrictive By-law—Illegality—Registration of Transferee—Agreement by Registered Holder to be Bound by By-law—Notice to Transferee—Whether Transferee Bound.*

A public company incorporated under the Ontario Companies Act cannot validly pass a by-law preventing a shareholder from transferring his shares as he sees fit so long as the shares are paid-up.

*Re Good and Jacob Y. Shantz Son & Co. Ltd.* (1911), 23 O.L.R. 544, *Re Belleville Driving and Athletic Association* (1914), 31 O.L.R. 79, and *Canadian National Fire Insurance Co. v. Hutchings*, [1918] A.C. 451, followed.

The Act authorises the formation of a private company in which the right to transfer shares may be restricted.

A mandatory order compelling the defendant company to register the plaintiff, the transferee of a share, as a shareholder, was granted, notwithstanding a by-law of the company providing that no share should be transferred to any person not already a shareholder until the company had had an opportunity to find a purchaser for such share.

The registered owner of the share had signed an agreement binding himself to abide by the provisions of the by-law:—

*Held*, assuming that the plaintiff had notice of this agreement, that he was not thereby deprived of his right to registration: a person acquiring a chose in action is not bound by mere notice of a personal covenant by his predecessor in title.

*National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co. Ltd.*, [1908] 1 Ch. 335, and *Barker v. Stickney*, [1919] 1 K.B. 121, applied and followed.

AN appeal by the plaintiff from the judgment of LENNOX, J., 26 O.W.N. 399, dismissing an action for a declaration that certain by-laws of the defendants, an incorporated company, were invalid and to compel the defendants to register the plaintiff as a shareholder.

March 18 and 19. The appeal was heard by LATCHFORD, C.J., MIDDLETON, ORDE, and SMITH, JJ.A.

*H. J. Scott*, K.C., for the appellant.

*W. N. Tilley*, K.C., and *A. W. Ballantyne*, K.C., for the defendants, respondents.

November 20. The judgment of the Court was read by MIDDLETON, J.A.:—Appeal by the plaintiff from the judgment of Mr. Justice Lennox, bearing date the 31st May, 1924, dismissing the action with costs.

The plaintiff, on the 23rd June, 1922, purchased a share of the capital stock of the defendant company from A. M. Orpen, who, in

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turn, had purchased the same from Charles Millar, who was the registered owner of the stock. Upon the plaintiff tendering his share for registration, registration thereof was refused, and the plaintiff now brings this action seeking a declaration that he is a shareholder in the defendant company, and a mandatory order directing it to enter his name upon the share-register.

The defendant company was incorporated on or about the 5th May, 1881, under the Ontario Companies Act. It refuses to register the plaintiff as a shareholder by reason of a by-law of the company, passed on the 24th November, 1910, restraining the transfer of shares by providing that no share shall at any time be transferred to any person not already a shareholder until the club has had an opportunity to find a purchaser for such share. A shareholder desiring to sell his share is required to give notice in writing to the club of his desire to sell. This notice then constitutes the club the shareholder's agent to sell the share at a price to be ascertained in the manner pointed out by the by-law, or at any lower price which the shareholder may fix. If the club within 30 days finds a purchaser desiring to purchase the share, the shareholder is then bound to sell upon payment of the price. If the shareholder refuses to carry out the transaction thus entered into, the club may itself enter the purchaser as the owner of the stock. The price to be paid, in the absence of a request to sell at a lower price, is to be the value to be ascertained from the club's balance-sheet. The defendants also rely upon the fact that notice of the terms upon which the shares were issued and held was printed prominently upon the face of each stock-certificate, and that each shareholder was required to sign an agreement acknowledging that shares were accepted and held subject to the condition contained in the by-law. This certificate and agreement were signed by Mr. Millar when he acquired the stock on the 13th December, 1910.

The whole fate of the action turns, first, upon the validity of the by-law as a by-law, and, secondly, upon the effect of the contract by Millar, a stockholder, to abide by the provisions of the by-law.

The learned trial Judge dismissed the plaintiff's action upon the sole ground that a demand for registration had not been shewn. Upon the appeal the case was argued upon broader lines, and, as I understand from counsel, counsel for both parties desire a decision determining the real question involved, and I shall, therefore, deal with the matter upon that footing.

It has been determined, by authority which is binding upon us, that a company incorporated under the Ontario Companies Act

cannot validly pass a by-law preventing a shareholder from transferring his stock as he sees fit so long as the stock is paid-up: *Re Good and Jacob Y. Shantz Son & Co. Ltd.* (1911), 23 O.L.R. 544; *Canadian National Fire Insurance Co. v. Hutchings*, [1918] A.C. 451; *Re Belleville Driving and Athletic Association* (1914), 31 O.L.R. 79.

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The Ontario Companies Act authorises the formation of a private company in which the right to transfer stock may be restricted, and the idea of any restraint upon the transfer of stock in a public company is entirely foreign to the scheme of the Act.

Turning then to the second aspect of the case presented, the effect of the agreement entered into by Mr. Millar, I am of opinion that, even assuming, as I do, that the plaintiff had full notice and knowledge of it at the time of his purchase, it does not prevent his acquiring valid title to the share, or deprive him of his right to its registration. It was at one time suggested that there was an equitable principle applicable to all property, and not confined to realty, thus formulated by Lord Justice Knight Bruce in *DeMattos v. Gibson* (1859), 4 DeG. & J. 276, at p. 282: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in the manner not allowable to the giver or seller"—this equity not resting upon any privity of contract but upon the notice and knowledge of the pre-existing contractual obligation.

The Court of Appeal in *London County Council v. Allen*, [1914] 3 K.B. 642, refused to sanction the extension of the doctrine of *Tulk v. Moxhay* (1848), 2 Ph. 774, beyond cases strictly falling under it, viz., contracts of a restrictive nature covering land, where a covenantee is in possession or interested in land for the benefit of which the covenant was entered into.

In *Barker v. Stickney*, [1919] 1 K.B. 121, the situation is clearly stated by Lord Justice Scrutton, at p. 132: "But as to personal property it was found that the general rule of Knight Bruce, L.J., was quite impracticable, and *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354, *McGruther v. Pitcher*, [1904] 2 Ch. 306, and *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847, have settled the law that the purchaser of a chattel is not bound by mere notice of stipulations made by his vendor unless he



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was himself a party to the contract in which the stipulations were made. I see nothing to distinguish a chose in action such as copy-right from chattels or land, and I think it is clear that a person acquiring a chose in action is not bound by mere notice of a personal covenant by his predecessor in title. That is the effect of *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146."

To this list of authorities I would add the decision of the Court of Appeal in *National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co. Ltd.*, [1908] 1 Ch. 335, as establishing that it is not possible for the owner of chattel property to attach to it any condition or covenant "running with the goods" analogous to covenants running with land, and so interfere in any way with the *jus disponendi* which is one of the inherent rights incident to ownership.

For these reasons, the appeal must be allowed, and the declaration and mandatory order sought for follow. No case is made for damages.

*Appeal allowed.*

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[IN CHAMBERS.]

1925.

RE JAMES LUMBERS CO. LTD.

Nov. 24.

*Company—Winding-up—Petition under Ontario Companies Act, sec. 187(c) — "Just and Equitable" — Dissatisfaction of Minority Shareholders—Control Exercised by Trustees under Will of Deceased Holder of Majority of Shares—Conduct of Business of Commercial Company—Election of Directors—"Deadlock"—Lack of Confidence in Directors—Failure to Justify—Dismissal of Petition.*

A petition by minority shareholders for an order for the winding-up of a solvent commercial company, incorporated under the Ontario Companies Act, was based on the "just and equitable" clause, sec. 187(c), of the Act, and was refused in the circumstances set out in the judgment below.

The company was like a private company in that the shareholders were few in number—all members of the same family—and that an attempt had been made, by by-law of the company, to restrict the right to transfer the shares. The shares did not represent money or other assets which the shareholders brought into the company. Everything that any shareholder had was a gift from the founder of the company, made either in his lifetime or by his will, and the power of control exercised by two shareholders, called "the respondents," who were directors of the company and trustees under the will, was a power conferred upon them as such trustees. The result of a winding-up order would be to remove the trustees appointed by the testator and to sell the assets of a business which the trustees were appointed to carry on. Upon the

evidence, there was no reason for saying that the capital represented by the shares was likely to be lost if the business which had been carried on by the company should be continued.

An alleged "deadlock" in regard to the election of a third member of the board of directors—a by-law of the company providing for the management of the company's affairs by three directors and fixing three as a quorum—was in fact caused by the petitioners, and was not, in the circumstances, a ground for directing a winding-up.

There was no evidence to justify a finding that the respondents—whatever their earlier conduct was—had recently been guilty of mismanagement, or of conducting the company's business in their own interest and in disregard of the rights of the petitioners, or of attempting to "freeze out" the petitioners. If there were differences of opinion as to how the business ought to be conducted, or as to whether dividends ought to be declared, or as to anything of that sort, the majority and not the Court must decide.

At the foundation of an application for winding-up under the "just and equitable" rule there must be a justifiable lack of confidence grounded on conduct of the directors in regard to the company's business, and not springing from dissatisfaction at being outvoted on business affairs or on what is called the domestic policy of the company. No such case was made here: it was not shewn that the directors had done anything to merit the distrust which the petitioners felt—the lack of confidence was the result, in part at least, of disappointed hopes of dividends.

*Loch v. John Blackwood Ltd.*, [1924] A.C. 783, referred to.

PETITION for an order directing the winding-up of the company.

October 27, 28, and 29. The motion was heard by ROSE, J., in Chambers.

*W. N. Tilley*, K.C., for the petitioners.

*Lewis Duncan*, *G. T. Walsh*, and *G. G. Plaxton*, for individual petitioners.

*F. W. Harcourt*, K.C., Official Guardian, for infant beneficiaries under the will of James Lumbers, deceased.

*R. S. Robertson*, K.C., and *A. L. Fleming*, for the company.

*A. C. McMaster*, K.C., for *W. G. Lumbers* and *J. H. Lumbers*.

November 24. ROSE, J.:—This is a motion by four of the six shareholders of James Lumbers Company Limited for the winding-up of the company under the "just and equitable" clause of the Ontario Companies Act.\* It is supported by the Official Guardian, who represents children of *N. W. Lumbers*, one of the petitioners, who, under the will of James Lumbers, deceased, are entitled to certain shares which are held in trust during the lifetime of *N. W.*

\* R.S.O. 1914, ch. 178, sec. 187: "A corporation may be wound up by order of the Supreme Court . . . (c) Where in the opinion of the Court it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it should be wound up."

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Lumbers. It is opposed by the other two shareholders, Mr. W. G. Lumbers, who is (or acts as) the president and general manager, and Mr. J. H. Lumbers, who is (or acts as) the vice-president, and by counsel instructed on behalf of the company by these two shareholders. For convenience Messrs. W. G. and J. H. Lumbers will be referred to as the respondents.

The late James Lumbers formed the company, under the Ontario Act, in 1906, to take over his wholesale grocery business. The authorised capital is \$250,000, divided into 2,500 shares of the par value of \$100 each. All of the shares were issued as fully paid in consideration of the transfer of the assets (including the goodwill) of Mr. James Lumbers's business. Mr. Lumbers gave a number of these shares to his children, the present shareholders. To Mr. L. O. Lumbers he gave 200; to Mrs. McCollum he gave 200; to Mr. N. W. Lumbers he gave 200; and to Mr. F. B. Lumbers he gave one; so that at the time of his death in November, 1923, these four, who are the petitioners, held among them 601 shares. To Mr. W. G. Lumbers Mr. James Lumbers gave 300 shares and to Mr. J. H. Lumbers he gave 200. The remaining 1,399 shares he held in his own name, so that he always had the control of the company.

A by-law passed as soon as the company was organised provides for the management of the company's affairs by a board of three directors, and fixes three as a quorum of the board for the transaction of business. As long as Mr. James Lumbers lived he was the president; the other directors were Mr. W. G. Lumbers and Mr. J. H. Lumbers; and Mr. W. G. Lumbers was general manager.

Another by-law, passed in 1910, enacts in effect that in case any shareholder desires to sell, pledge, or otherwise deal with his shares or any of them, he, before accepting any offer, must tender the shares to the other shareholders through the board of directors upon the terms offered to him by the person with whom he desires to deal, and must not accept the offer made to him until the other shareholders have declined to take the shares or have let 30 days go by without accepting them. This by-law was the subject of considerable discussion upon the argument of the motion; the importance of it will appear later on.

While Mr. James Lumbers lived, or at least so long as he was able to direct the affairs of the company, the business was treated as his business. One result of this was that, although the business was prosperous, no great effort was made to declare dividends, but considerable sums were paid to Mr. James Lumbers as bonuses, and he out of his income made presents to his children. Other results,

perhaps, were that certain transactions with regard to some "Vine-land" companies (to which much attention was directed in the affidavits and examinations and upon the argument) were carried through in an unusual manner; and that little attention was given by the present petitioners to the drawings by Mr. W. G. Lumbers under a resolution passed by the directors in January, 1912, providing for the payment to him annually of ten per cent. of the net profits of the company. The question as to the propriety of these drawings is another question much debated upon the argument of the motion.

By his will and codicils, the last of which was made in October, 1920, Mr. James Lumbers disposed of his 1,399 shares of the capital stock of the company as follows:—

He directed his executors to set aside 1,035 shares and out of the dividends or other income derived therefrom (1) to pay taxes and other charges in connection with his improved real estate and the interest secured by any mortgage upon a house belonging to his wife; (2) to pay \$5,000 per annum to his wife during her widowhood; (3) to pay off the principal secured by any mortgages on his real estate; and (4) after all the mortgages had been discharged to divide the dividends or other income remaining after the payment of the taxes, etc., and the payment to his wife, into six equal parts and to pay one of such parts to each of his five children other than N. W. Lumbers and to hold and use the sixth part for the benefit of N. W. Lumbers; and he directed that upon the death of his wife the 1,035 shares should go as follows: to J. H. Lumbers 250 shares, to W. G. Lumbers 200 shares, to L. O. Lumbers 250 shares, to Mrs. McCollum 175 shares, and in trust for N. W. Lumbers and his children 160 shares. The remaining 364 of the 1,399 shares he gave to his executors in trust to pay the dividends or other income to or for the benefit of F. B. Lumbers during his life, with certain powers to the executors to transfer the shares of F. B. Lumbers in certain events, and after the death of F. B. Lumbers to transfer to his children such shares as had not been transferred to him in his lifetime, or in the event of the death of F. B. Lumbers leaving no children surviving, then (subject to a provision for the widow, if any, of F. B. Lumbers) to divide such untransferred shares among the surviving children of the testator and the issue of any deceased children equally *per stirpes*.

The testator expressed the desire that Mr. W. G. Lumbers should be continued as manager of the company unless he should be or become incompetent, and he authorised the executors "through their holdings of stock in the said company and their power over or

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as directors of the company" to provide that W. G. Lumbers as manager should have a salary of at least \$4,000 a year. He appointed his widow and Messrs. W. G. Lumbers, J. H. Lumbers, and L. O. Lumbers to be his executors and trustees; he directed that so long as the executors and trustees should hold the 1,035 shares or any of them or any other stock in the company the voting power in respect of such shares should be exercised by W. G. Lumbers and J. H. Lumbers and the survivor of them; but as to the 364 shares set aside for F. B. Lumbers he gave the voting power to W. G. Lumbers. He declared that the executors and trustees as directors or shareholders should not be bound to use their power to declare dividends if in their judgment it would be in the interest of the company and its business to retain the profits for use in the business. He imposed upon each of his children, and made the transfers of their shares to them by the executors subject to, the condition that none should be at liberty to dispose of any shares without first offering them to the other members of his (the testator's) family through the board of directors.

The result of the will is that, in addition to holding the 601 shares which they held in their father's lifetime, the petitioners and the children represented by the Official Guardian are interested in 949 shares, of which 425 will go to the petitioners L. O. Lumbers and Mrs. McCollum absolutely upon the death of their mother; so that the petitioners and the infants own or are interested in 1,550 shares or 62 per cent. of the capital stock of the company; but that the voting power rests with the respondents, who own absolutely 500 shares and are beneficially interested in 450 others which will be theirs absolutely upon the death of their mother.

The first annual meeting of shareholders after the death of Mr. James Lumbers was held on the 15th February, 1924. Messrs. W. G. Lumbers, J. H. Lumbers, and L. O. Lumbers were elected directors, Mr. W. G. Lumbers was made president and general manager, and Mr. J. H. Lumbers was made vice-president. Some difficulty had arisen regarding Mr. F. B. Lumbers's relations with the company. He had been a salesman and had resigned his position because, as he says, he had been unfairly treated in that the true costs of goods which it had been his business to sell had not been given to him, or, as others say, for another reason; but notwithstanding his resignation he had been coming to the company's offices and apparently interrupting employees. In these circumstances, the other shareholders saw fit to pass a resolution instructing the general manager to take steps to prevent any interference by Mr. F. B.

Lumbers. Apart from this incident the annual meeting seems to have been harmonious. An arrangement was made—whether at this meeting or another is not clear to me—that \$20 a week be advanced to Mr. F. B. Lumbers; and the advances have been made and charged in the company's books.

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During the year following the meeting just mentioned dissatisfaction with the management of the company arose (or increased, if it had arisen before), one of its causes (or, as is suggested, the sole cause) being that no dividends were being paid. Exactly what occurred during the year it is difficult to discover from the affidavits and examinations; but that there was a lack of harmony is evidenced by the fact that at the annual meeting for 1925, held on the 19th February, Mr. L. O. Lumbers was accompanied by a chartered accountant, Mr. Hardy, while Mr. N. W. Lumbers and Mr. F. B. Lumbers brought their solicitors. This was an unpleasant meeting, lasting for some hours, and there is a good deal of contradiction as to what actually occurred. There was a distinct division of the shareholders into two parties, Messrs. W. G. and J. H. Lumbers using the voting power conferred upon them by Mr. James Lumbers's will to vote down proposals to oust Mr. W. G. Lumbers from his position as general manager and to increase the number of directors to five. There is some doubt even as to whether there was a valid election of three directors for the present year. There was a purported election of Messrs. W. G. and J. H. Lumbers and Mrs. McCollum, but Mrs. McCollum expressed an unwillingness to act, and it may be that she did not even temporarily withdraw her objection. The probability, however, seems to be that she did allow herself to be elected and did concur in the holding of a directors' meeting immediately after the close of the shareholders' meeting, and at that meeting of directors did concur in the appointment of Mr. W. G. Lumbers as president and general manager and of Mr. J. H. Lumbers as vice-president, and then withdrew, before the other business that is recorded in the minutes of the directors' meeting was transacted. There was passed at the annual meeting a resolution to continue the payment to Mr. F. B. Lumbers of the \$20 a week that has been mentioned; and on motion of Mr. J. H. Lumbers, seconded by Mr. L. O. Lumbers, Mr. Hardy was appointed to "investigate the affairs of the company and report to a shareholders' meeting to be called within one week after the receipt of his report."

Mr. Hardy proceeded with his investigation; and concurrently Mrs. McCollum's solicitors made an investigation, and there is

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produced a series of letters from them to Mr. Hardy commencing with one of the 5th March, 1925, and running through March, April, May, and the early part of June, conveying information as to certain transactions which, the solicitors suggested, ought to be looked into by Mr. Hardy and dealt with. These transactions include the dealings with the shares and assets of the Vineland companies before mentioned, the payment of bonuses to Mr. James Lumbers, the drawings by Mr. W. G. Lumbers whether as salary or bonus, payments to Mr. J. H. Lumbers, borrowings by shareholders, transactions between the company and the estate of Mr. James Lumbers, and many other matters.

Mr. Hardy's report was not ready until the 16th June, 1925; but on the 4th June Messrs. N. W. Lumbers, L. O. Lumbers, and F. B. Lumbers, through their solicitors, presented a requisition for the calling of a meeting of shareholders to consider a resolution for the voluntary winding-up of the company; and Mr. J. H. Lumbers caused such a meeting to be called for the 15th June, 1925. The meeting was held and the stenographic report of the proceedings is produced. Messrs. N. W. Lumbers, L. O. Lumbers, and F. B. Lumbers were accompanied by their respective solicitors; and there were also present at first one and later two solicitors acting for the company. A whole day was spent in heated but futile discussion, first as to whether Mr. F. B. Lumbers should be allowed to have present the particular solicitor whom he had instructed, and then as to the accuracy of the minutes of the annual meeting and as to other matters; and there was some purported election of new directors by the present petitioners, the so-called new board being Mr. W. G. Lumbers, Mrs. McCollum, and Mr. L. O. Lumbers. Finally there was an adjournment until the next day, the 16th, it having been learned that Mr. Hardy's report would be ready then. On the 16th June the report was read and there were explanations by Mr. Hardy of various matters upon which he was questioned, and statements by one and another of the directors and shareholders; and there were attempts to pass some resolutions which were ruled to be out of order; and there was a divided vote upon a motion to adjourn, the respondents voting for and purporting to pass a resolution to adjourn for ten days so that there might be consideration of the report and of other matters before the meeting was re-convened, and the other shareholders voting for and purporting to pass a resolution to adjourn until the next day. On the 17th June the four who had voted for the short adjournment met and continued their discussion, and one of the solicitors who had appeared for the company attended and advised them not to



continue the meeting but to try to find some solution of the difficulties that had arisen. Then the three who claimed to have been elected directors on the 15th June met and purported to pass a resolution calling another meeting of directors.

Then there was a meeting of all the shareholders on the 24th June, called by the president pursuant to the resolution passed by him and Mr. J. H. Lumbers on the 16th June, solicitors attending as before. Mr. Hardy's report had been completed in the meantime and it was read and explained and discussed; and charges were made and repudiated concerning some of the grievances or alleged grievances of the company or of the shareholders against the respondents. There was a motion by Mr. L. O. Lumbers instructing the directors to take action against Mr. W. G. Lumbers to recover money lost to the company in the "Vinelands" transaction, which motion was ruled out of order. Then there were various proposals as to finding a *modus vivendi*, following which was a suggestion of an arbitration which seemed to meet with general approval, although there were differences as to what should be the scope and form of the reference. Afterwards submissions to arbitration were drafted, one by the solicitor for the company and the other by the solicitors for the present petitioners, but neither draft proved to be acceptable to all concerned—as was not unnatural, considering the complicated nature of the disputes and the difficulty of framing a submission which would enable the arbitrators not only to pass upon the disputed matters but also to give directions as to what was to be done about the business—and there were and are reciprocal charges of going back upon what was agreed at the meeting. A further meeting held on the 14th July had no apparent result but to intensify the existing bitterness of feeling.

From the reports of the meetings and from the affidavits it appears to be reasonably certain that as matters stand at present no working board of three directors can be formed: some, perhaps all, of the petitioners are unwilling to act with the respondents, and there are some with whom Mr. W. G. Lumbers or Mr. J. H. Lumbers will refuse to sit. Mrs. McCollum, who, as has been stated, seems to have been elected at the last annual meeting, will not act; so that no meeting of the present board is possible; and no one else—or no one acceptable to the respondents—will take Mrs. McCollum's place. In that sense there is at present a deadlock; although the business of the company is not at a standstill, because there are few matters in the ordinary course of the business of the company that are not matters of routine, capable of being attended to by the executive officers without any special authority from the

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board. Whether this deadlock can be broken by the respondents in any one of several ways discussed on the argument of the motion is a question upon which any positive expression of opinion would be premature. Mr. Tilley expressed himself as inclining to the opinion that the by-law that forbids a transfer of shares to any one other than one of the present shareholders, without a previous offer to and rejection by the present shareholders, is invalid; and, therefore, that the respondents could form a board by transferring some of the shares which they held in Mr. James Lumbers's lifetime (not some of the shares given to them by the will, to which different considerations apply) and electing the transferee to the board, by exercising the voting powers given to them by the will; and, as no one suggested that this course could not be followed, and as *primâ facie* it appears to me that legally it would be valid, I shall assume for the purposes of this motion that what is suggested could be done—although, as stated already, my opinion is that a decision of the question before any such course is adopted and attacked would be ill-advised. Another suggestion, made by Mr. Robertson and Mr. McMaster and dissented from by Mr. Tilley, is that the company (by the votes of the respondents) could amend the by-law that fixes three as a quorum and could make the quorum two—if indeed it is not now two as a result of the legislation: the Ontario Companies Act (1907) 7 Edw. VII. ch. 34, sec. 81 (1); the amendment of 1908, 8 Edw. VII. ch. 43, sec. 1 (9); the present Act, R.S.O. 1914, ch. 178, sec. 85 (2)—but this suggestion, also, is one upon which no opinion need be expressed. The same observation applies to a suggestion that the shareholders could pass a by-law providing for a board of five directors with a quorum of three.

Another fact emerging from the materials is that some at least of the petitioners are without confidence in the respondents, the president and the vice-president of the company. They think for one thing that Mr. W. G. Lumbers so managed matters connected with the "Vinelands" companies that, while the James Lumbers Company lost a great deal of money which was owed to it by one of the Vineland companies, and was at an expense of some \$34,000 in connection with the liquidation of that company and the keeping of its assets intact, he, W. G. Lumbers, largely because of this expenditure by the James Lumbers Company, was enabled to acquire the assets of the Vineland company and to turn them over to other companies which he formed, for shares in those other companies, which shares he has not dealt with in what they (the petitioners) think would have been the proper manner, regard being had to the intentions of Mr. James Lumbers and to the holdings of shares in the companies that were wound up—especially the holdings of Mr.

L. O. Lumbers and his wife. All these transactions in connection with the Vinelands companies, and with certain holding or marketing companies out of which Mr. W. G. Lumbers made the money with which he bought the "Vinelands" assets, took place years ago, in the lifetime of Mr. James Lumbers; and Mr. W. G. Lumbers, besides asserting that his action was in itself correct, alleges that Mr. James Lumbers knew exactly what was done and approved of it, and, indeed, in great part directed it. Upon the evidence produced it seems to me to be quite impossible to form a safe opinion as to whether in these transactions Mr. W. G. Lumbers did or did not fail in his duty as manager of the James Lumbers Company or did or did not act unfairly towards the other members of the company. The transactions were somewhat complicated; evidence in the form of affidavit and cross-examination is far from satisfactory upon such an issue; and I can find no more than that the petitioners believe they have a grievance, and that such belief has diminished their confidence in Mr. W. G. Lumbers. Certainly, I cannot find that justice and equity to all concerned require the winding-up of the company for the purpose of enabling a liquidator to prosecute a claim against Mr. W. G. Lumbers in connection with these matters: the claim of the company, if there is one, can be established by the petitioners in an action to which the company is made a party just as well as it can be in winding-up proceedings. Whether the petitioners' loss of confidence in Mr. W. G. Lumbers, in so far as it is based on their belief in the wrongdoing which does not seem to me to be established, is a reason for making the order will be discussed later.

In connection with the Vineland transactions the petitioners complain of the conduct of Mr. J. H. Lumbers also. Mr. J. H. Lumbers says that there has been such a turmoil since the presentation of Mr. Hardy's report (in which the matter is discussed at considerable length) that he has not been able to analyse the report thoroughly, or to make up his mind whether any claim ought to be made or not. The petitioners say that he has had more than three months in which to make up his mind, and that if his statement is true he shews that he has failed in his duty as director: they say that he was bound to inform himself as to this and the other matters of their complaint against Mr. W. G. Lumbers before he voted on the motion to wind up the company.

Another matter of complaint against Mr. W. G. Lumbers is in connection with what have been referred to as "bonuses." This also is a past transaction: no bonuses are being paid now, but only a salary which does not seem to be larger than the manager of such a company ought to have if he is competent and is attending to the

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business. As has been stated, a resolution was passed in 1912, providing for the payment to Mr. W. G. Lumbers annually of ten per cent. of the whole net profits of the company provided they amounted to \$25,000 or over. In the minute-book where this resolution appears there is an interlineation which includes the words "but in making deductions to arrive at net profits bonuses are not to be deducted;" and there is a suggestion, but no proof, that at some time after the resolution was passed there was an unauthorised alteration of it; and also an allegation that Mr. James Lumbers intended that the ten per cent. should be upon the excess of the net profits over \$25,000, and that he so expressed himself in casual conversation with some of the deponents; but that Mr. W. G. Lumbers has treated the resolution as meaning that the percentage should be upon the whole net profits provided that the net profits exceeded \$25,000. Whatever Mr. W. G. Lumbers drew pursuant to this resolution was shewn on the books, and, presumably, could have been ascertained by any of the shareholders if they had inquired—unless indeed Mr. James Lumbers was satisfied, as Mr. W. G. Lumbers says he was, and would have supported Mr. W. G. Lumbers in a refusal to give information. But the petitioners did not inquire, and they say that at the annual meetings of the company they were never given any such full statement of the company's business and affairs as indicated to them that more was being drawn than was justified by the profit and loss account for the year. Mr. Hardy, analysing the accounts, reaches the conclusion that in many years there was a failure to make proper deduction for losses, depreciation, and (in one or more years) disbursements that ought to have been treated as operating charges; and that, in consequence, in those years there were overpayments which, after crediting an amount earned in 1914, but not paid, came to some \$15,000. Mr. W. G. Lumbers says that he is not an accountant, that he took without question what the company's bookkeeper, in whom he had confidence, placed at his credit, and that his father was content with what was done; and he calls attention to a by-law of June, 1923 (noted by Mr. Hardy also), by which his salary was increased and the arrangement for a percentage cancelled and all payments theretofore made to him under the by-law of 1912 were approved. The petitioners of course say that the resolution ought not to bind them, as they did not know the facts; and as to their father's approval of this and other matters they say that during the later years of his life Mr. James Lumbers was incapable of understanding, or did not understand, the details of the business. (On the question as to Mr. James Lumbers's capacity there are many somewhat conflicting affidavits.



It seems to be probable that latterly, while he could understand, he did not and could not direct, but left matters of business largely to the two sons, W. G. and J. H. Lumbers; who since their boyhood had been with him in the business.) There are produced reports of chartered accountants who audited the company's books in 1918, 1919, 1920, and 1921. These do not shew the payments to Mr. W. G. Lumbers as separate items; but it is to be noted that for the years 1919 and 1920, in which years Mr. Hardy thinks there were over-payments, the auditors shew "net profits" of an amount different from Mr. Hardy's "operating profits;" and it would seem to me to be unfair to find as a fact, upon this motion and without hearing witnesses as to the correctness of Mr. Hardy's assumptions, that Mr. W. G. Lumbers in any given year drew more than he was entitled to. Certainly, it would be impossible to find that fraudulently or knowingly he took more than the by-law gave him. Therefore, while it seems that the petitioners believe that Mr. W. G. Lumbers acted improperly in respect of the percentage on net profits, it cannot be found as a fact, upon the materials now available, that their loss of confidence in him as manager is well-founded in so far as it arises from this belief.

Another complaint is in respect of loans by the company to Mr. W. G. Lumbers and others. Such loans seem to have been usual both while Mr. James Lumbers was taking an active interest in the business and after he had ceased to direct the affairs of the company to the extent to which he had directed them while his faculties remained unimpaired. The advances to some members of the family were larger than those to others; and it does not seem strange that Mr. W. G. Lumbers, whose income, apparently, was larger than those of the others and who seems to have been interested in some financial transactions which did not concern the company, should sometimes have had advances of a considerable amount, just as at certain times he had considerable amounts standing at his credit on the books of the company. There is no suggestion that the advances to him were concealed or that he was at any time unable to pay what he owed. In fact he has repaid all the advances, and I am unable to find in the history of these transactions anything to indicate that if he is left in control of the company he will "operate the business for his own advantage and the advantage of his family" as the petitioners allege he has been doing. There is an outstanding loan to Mr. J. H. Lumbers which, in view of the present attitude of the petitioners towards loans to directors, ought to be repaid; but it is very small as compared with Mr. J. H. Lumbers's interests in the business, and its

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existence does not seem to me to be of much importance on this motion. The advance was made because the company had guaranteed an indebtedness which Mr. J. H. Lumbers was unable to meet when called upon. The guarantee, presumably, would not have been given by a company other than a family concern such as this company was; but the complaint, regard being had to all the conditions, seems to be trivial.

The company, as has been mentioned, has prospered. At its inception, the goodwill of Mr. James Lumbers's business, which was taken as part of the assets transferred to the company as the consideration for the issue of the whole of the capital stock of \$250,000 as fully paid, was put in at over \$100,000; but to-day, although there have been large distributions of profits, sometimes as "bonuses" and sometimes as dividends, it is estimated by Mr. Hardy that a liquidation conducted with reasonable skill, and reasonably successful, would probably result in the realisation for the shareholders of the par value of their shares in cash. But trade conditions for a few years past have been such that the lot of the wholesale grocer has not been particularly happy, and this company has not been paying dividends, and there is no certainty—although Mr. J. H. Lumbers expresses a hope—that dividends will be paid in the near future. This it is that makes the petitioners so anxious to have the company wound up. They are now genuinely distrustful of the respondents, and they resent what they deem to be high-handed procedure on the part of these gentlemen in the management of the business, the conduct of meetings, the withholding of information, and the like; and they will not be satisfied without some change of management; but underlying all this, and to some, perhaps to a very large, extent producing the distrust, dissatisfaction, and resentment, is the fact that no dividends are being paid, and that the petitioners believe that if the company was wound up, and the money realised was invested in interest-bearing securities, they would have an annual income. The petitioners say that their father intended that they should have an income, and thought that by providing for the continuance of the business under the management of the respondents he was making it sure that such income would be produced; and they suggest that his real intention is being frustrated; and that the only way to give effect to the true intention of his will is to wind up the company and invest the proceeds in something that will bring an annual return. The Official Guardian, as has been mentioned, supports them. He is con-

cerned with the position of children who will or may take the shares in which their fathers are interested for life; and he thinks that the position of those children will be improved if the money realisable in respect of the shares is taken out of what seems to him in the circumstances to be a somewhat hazardous undertaking and is invested in something safer.

The case differs materially from most of the cases in which the "just and equitable" clause of the statute has been invoked. The company is like a private company in that the shareholders are few in number and that an effort has been made to restrict the right to transfer the shares; but the position of the shareholders differs from that of most shareholders in that the shares do not represent money or other assets which the shareholders brought into the company. Everything that any shareholder has in this company was a gift from Mr. James Lumbers, made either in his lifetime or by his will; and the power of control which the respondents are exercising is a power conferred upon them as trustees appointed by the will. The result of the order asked for would be, therefore, to remove the trustees appointed by the testator and to sell the assets of a business which those trustees were appointed to carry on. Of course, each of the petitioners has shares that are not affected by the will, and as holders of those shares the petitioners are qualified to present the petition and would have been qualified to present a similar petition in Mr. James Lumbers's lifetime, and the petition must be dealt with upon that footing; nevertheless the other aspect of the case must be kept in mind—it must be remembered that an order to wind up the company will frustrate the expressed wish of the testator, who, being the holder of the majority of the shares, bequeathed his holdings to trustees in trust to carry on the business for the benefit not only of his children (the petitioners and the respondents) but also for the benefit of his estate generally and of his widow. The fact that the testator wished the business to be continued is perhaps of little weight if it is true, as the petitioners suggest, that the testator's real purpose will be frustrated if the respondents are allowed to continue in control; otherwise it is of importance.

The petitioners seem to me to be in error in thinking that the testator's object, or primary object, in disposing of his shares as he did was to provide an income for them. The first charge under the will on the earnings of the 1,035 shares was the taxes and other charges against the testator's improved real estate and his wife's house; the second was the wife's income; the third was

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the principal of any mortgages on real estate; and it was only when all these had been provided for that the legatees of the shares were to receive the dividends. And the testator did not desire that dividends should be paid at all hazards: he desired his business to continue, and he declared expressly that his trustees acting as directors should not be bound to declare dividends if in their judgment it would be in the interest of the company and its business to retain the moneys for use in the company's business. Moreover, it is by no means certain that, even if the testator was very desirous that his children soon after his death should begin to receive an annual income from such portion of his estate as was invested in the business, his desire would be accomplished by winding up the company now. It may be that a voluntary and gradual winding up by the officers of the company would result, in time, in what the petitioners hope for, viz., the realisation of not less than the par value of the shares. But no one has had the temerity to say that any such result could be accomplished by an immediate sale of the assets; and there is no kind of certainty—indeed, so far as the evidence goes, it cannot be said that it is established that there is reason to hope—that, by any kind of liquidation, the par value of the assets could be got in in cash, and invested and made to produce an income of which the first instalment would be received before the time when the company, if it is allowed to go on, can resume the payment of dividends. Upon the evidence, there is no reason for saying that the capital represented by the shares is likely to be lost if the business continues: the company has been prosperous in the past; the management is in the hands of persons apparently competent and heretofore successful; those persons are substantially interested in the assets and were trusted by the testator, and they think that the business ought to continue.

In these circumstances it is quite impossible, in my opinion, for a court to say that the business ought to be wound up just for the purpose of making the assets more secure and giving effect to a supposed desire of the testator to provide an income for his children by the disposition that he made of his interest in the company. The claim of Mrs. James Lumbers upon the income of the business is prior to that of the petitioners, and she, as well as the petitioners and the respondents, must be considered in deciding what is just and equitable in the circumstances. She takes no part upon the motion; but the trustees are trustees for her as well as for the others, and until the contrary is shewn one must assume that the respondents have considered what is best for



her. If that assumption is justified it is another reason why the Court should hesitate to overrule the decision of the respondents upon any such ground as that just discussed.

Next as to the deadlock. It is pointed out that when the testator gave power to the respondents to vote in respect of the shares held in trust, he knew that the by-laws provided for a board of three directors all of whom must be present to form a quorum, and that he knew also of the regulation against the transfer of shares to persons other than members of the company; and it is said that the control which the testator intended to be vested in the respondents was in effect, and so far as the management of the business goes, a control to be exercised merely by selecting three of the testator's children to act as directors; and that if the respondents attempt to break the "deadlock" by qualifying some one who is not a member of the family and electing him to the board, they will be attempting to do something contrary to the wishes of the testator. It is said that, although it is probable that the "deadlock" can be broken, it is certain that it cannot be broken without a departure from the scheme of the will; and it is argued (or so I understood the argument) that to allow the company to continue in business under the management of a board constituted in the way suggested is to frustrate the testator's wish. The answer to this argument seems to me to be, first, that what is anticipated has not yet been done, and that it is to be hoped that the necessity for doing it will be avoided in some way; and, secondly, that, even if it does become necessary to attempt to constitute a board such as is suggested, the necessity will have been created by the act of the petitioners. The respondents have tried to elect a board composed of three members of the testator's family; but Mrs. McCollum, apparently acting as all the petitioners desire, has refused to serve as a member, and it would not seem to be open to the petitioners to ask for a winding-up merely because the respondents, being unable to carry on the business precisely in the way contemplated by the testator, had adopted the next best course. Apparently the testator's intention was that there should always be on the board one of the petitioners, with whom the respondents should confer; but he knew that if the respondents elected themselves to the board they could always control its actions. Their power of control will not be increased by the substitution of an outsider for one of the petitioners; and if the petitioner chosen by the respondents will not act as a member of the board, the petitioners cannot complain that the respondents, as two members of the board, are acting without conference with another member of the family.

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Mr. J. H. Lumbers does seem to have been slow in making up his mind as to whether he would join with the petitioners in taking action against Mr. W. G. Lumbers in respect of one or more of the matters discussed in Mr. Hardy's report, and he does seem to know a good deal less about the Vineland transactions than one who was a member of the board of one or more of the Vineland companies ought to know; but there is a good deal to be said for his contention that the question as to the prosecution of a claim against Mr. W. G. Lumbers is something to be considered after the motion to wind up the company has been disposed of. He, as a shareholder, stands to gain, in the same way as the petitioners, any advantage that is to be gained by the prosecution of any of the claims against Mr. W. G. Lumbers; and it can hardly be that his refusal to join at this time in the prosecution of any such claim, or even his apparent neglect of some of the duties that devolved upon him as a director of the Vineland companies—he says that in connection with those companies he left his interests largely in the hands of Mr. L. O. Lumbers—, furnishes a sufficient ground for saying that there has been such a failure by him to perform the duties of a director of the James Lumbers Company as would justify the compulsory winding-up of that company, for the purpose of doing away with his control of its assets.

Some recent cases in which an order to wind up a company was made because justice and equity required it are: *In re Yenidje Tobacco Co. Ltd.*, [1916] 2 Ch. 426; *Loch v. John Blackwood Ltd.*, [1924] A.C. 783; *Baird v. Lees*, [1924] S.C. 83; *Thomson v. Drysdale*, [1925] Scots L.T. 174. All of these, however, are cases readily distinguished in their facts from the present case. In the first place there is the fact to which I have been alluding, that the holders of the shares of the James Lumbers Company are not co-adventurers who, having supplied the company with its assets, find themselves in disagreement as to how those assets should be employed. The petitioners hold some shares which did not come to them under Mr. James Lumbers's will; but, even if these are treated as something which in Mr. Lumbers's lifetime were effective to put the petitioners in a position as favourable, upon such a motion as this, as that of co-adventurers with Mr. James Lumbers and the respondents, the fact remains that the petitioners were minority shareholders and that Mr. James Lumbers retained control of the company. The interest that Mr. James Lumbers retained he has passed on to his executors; and, while the will gives the petitioners an interest in the shares held by the executors, those last-mentioned shares are at the moment

the shares of Mr. James Lumbers's estate, and the petitioners continue to be the minority shareholders; and the estate, represented by the respondents at all meetings of the company, continues to be the majority shareholder. The power of control that the respondents are exercising is therefore by no means a usurped power or a power acquired by any unfair means; on the contrary, it is the power that Mr. James Lumbers retained for himself while he lived, and passed on to the respondents by his will. Thus one circumstance that has been deemed important in some of the cases is lacking here.

Sometimes a shareholder who has got control by fair means proceeds to use it unfairly, as, for instance, by treating the company's business and assets as his own and disregarding the rights of his co-adventurer. Sometimes he acts in this way for the purpose of making the position of the minority intolerable and forcing his co-adventurer to sell out to him at an undervalue. Sometimes he does it for other improper or dishonest reasons. When this sort of thing happens the Court may find—as the cases cited shew—that justice and equity require the winding-up of the company. But the present case, in my opinion, does not fall within this class. There may or may not have been something unfair or improper in Mr. W. G. Lumbers's conduct in connection with the Vineland companies or in connection with the ten per cent. of the net profits, or in giving insufficient information to the shareholders; and if there was it may or may not have been condoned by Mr. James Lumbers. These, however, as I have said; are questions which cannot, in my opinion, be decided upon the evidence now before the Court. But, whatever the truth may be as regards these early transactions, there is no evidence to justify a finding that the respondents recently have been guilty of mismanagement, or of conducting the company's business in their own interest and in disregard of the rights of the petitioners, or of attempting to "freeze out" the petitioners. If there are differences of opinion as to how the business ought to be conducted, or as to whether dividends ought to be declared, or as to anything of that sort, the majority and not the Court must decide: *Re Harris Maxwell Larder Lake Gold Mining Co. Ltd.* (1910), 1 O.W.N. 984; Buckley's Companies Acts, 10th ed. (1924), p. 316.

Sometimes, when there is the kind of "deadlock" that the Court had to consider in the case of a "two man" company in *In re Yenidje Tobacco Co. Ltd.*, [1916] 2 Ch. 426, the interference of the Court is necessary; but, for reasons already stated, I am of opinion that no such deadlock exists here.

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In such circumstances as have just been mentioned there is necessarily a lack of confidence, either causing the deadlock or springing from the discovery of the improper conduct; and in delivering the judgment of the Judicial Committee of the Privy Council in *Loch v. John Blackwood Ltd.*, [1924] A.C. 783, Lord Shaw of Dunfermline lays it down that at the foundation of applications for winding-up on the "just and equitable" rule there must be a justifiable lack of confidence, grounded on conduct of the directors in regard to the company's business, and not springing from dissatisfaction at being outvoted on business affairs or on what is called the domestic policy of the company. That statement of the law seems to me to make it clear that in the present case there is no sufficient ground for ordering the company to be wound up. In my opinion, there is no proof that either of the respondents, as a director, either by acts such as have just been discussed or otherwise, has been guilty of misconduct sufficient to destroy a reasonable shareholder's confidence that the business, if left in the hands of the respondents, will be conducted competently and honestly and in the interest of all the shareholders, including the petitioners and Mr. James Lumbers's estate. Therefore, I cannot find that there is that justifiable lack of confidence that would suffice to support the order. Moreover, I think, as I have intimated, that this case is one in which it is even more than ordinarily necessary to be very sure that the lack of confidence is justifiable. The winding-up of the company would involve a radical departure from the scheme devised by Mr. James Lumbers for the management of his whole estate. Pending the realisation of the assets and the investment of the proceeds, the source to which the testator looked for funds for the payment of the annual charges against his improved real estate, for his widow's income, and for the payment of the mortgages against his land, would be cut off; and there is no certainty that when the assets had been realised the result would be found to be what the petitioners desire and have been told there is reason to expect: there might be a loss on the liquidation of the assets, and the new income-producing fund might not come into being or might be much smaller than the petitioners expect. This risk of loss is something to which the Court ought not lightly to subject either Mrs. James Lumbers or the estate generally; and so I say that before proceeding upon the ground of the petitioners' loss of confidence in the respondents the Court ought to be quite sure that the respondents as directors have really done something to merit the distrust which the petitioners feel, and that the lack of con-



fidence is not the result—as I think it is, in part at least—of disappointed hopes of dividends.

My opinion is that, upon the materials before me, it would be very rash, and neither just nor equitable, to order the company to be wound up. The motion will be dismissed with costs payable by the petitioners to the company and to Mr. W. G. Lumbers and Mr. J. H. Lumbers.

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*Trial—Action to Set aside Will for Undue Influence and Lack of Testamentary Capacity—Motion to Postpone Trial in Order to Have Trial by Jury—Power of Judge Presiding at Toronto Non-Jury Sittings to Summon Jury—Jurors' Act, R.S.O. 1914, ch. 64, secs. 45, 78—Discretion of Judge—Previous Decision on same Question—Practice.*

This action, wherein the plaintiff attacked a will on the grounds of undue influence and lack of testamentary capacity, having by order of MEREDITH, C.J.C.P., been removed from the list of actions for trial at a Toronto jury sittings and placed on the list of actions for trial at a Toronto non-jury sittings (see 57 O.L.R. 679), a motion was made on behalf of the plaintiff before the Judge presiding at the latter sittings, the case being on the peremptory list for the day on which the motion was made, for an order postponing the trial so that the case might come on for trial on a day when a Toronto jury sittings was being held, in order that the Judge then presiding at the non-jury sittings might, in the exercise of his discretion, direct a trial with a jury, and send the action for trial to the concurrent jury sittings. It was also suggested that the Judge to whom the application was made might at once summon a jury or call a special jury:—

*Held*, that secs. 45 and 78 of the Jurors' Act, R.S.O. 1914, ch. 64, relied on by the plaintiff, did not authorise the summoning of a jury by the Judge at a non-jury sittings, and that course could not be adopted.

*Held*, also, that the main motion must be dismissed, applying and following the decision of MEREDITH, C.J.C.P., and because the case was not one which, in the opinion of the Judge who heard the application, exercising such discretion as he had, should be tried by a jury. The difference between the practice here and that in England, in regard to the trial of actions such as this with or without a jury, pointed out.

MOTION by the plaintiffs for an order postponing the trial of this action.

November 23. The motion was heard at a Toronto non-jury sittings by GRANT, J., the presiding Judge.

D. L. McCarthy, K.C., and Erichsen Brown, for the plaintiff.

J. H. Fraser, for a defendant, supported the motion.

I. F. Hellmuth, K.C., W. N. Tilley, K.C., and William Mulock, K.C., for the other defendants, opposed the motion.



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November 30. GRANT, J.:—This action was on the list for the Toronto non-jury sittings, and came on before Logie, J., on the 11th November inst. The action was then put over until the 23rd November, on which date counsel for the various parties appeared and a motion was made before me as the Judge presiding at the sittings, the case being on the peremptory list for the day, for an order to postpone the trial until January next. The only reason given for the request for the postponement was quite frankly stated to be the desire that the case might come on for trial at a time when there would be a jury sittings going on, so that the trial Judge before whom the case would then come might, in the exercise of his discretion and if he should wish to do so, direct that such trial should be with a jury, as he would then be able to transfer the case to the Court then sitting for the trial of actions with a jury. Counsel for the plaintiff also contended that I had the power to summon a jury or direct the calling of a special jury for the trial in this Court, and requested that I should do so. I take this to have been intended as an alternative proposal, and for convenience will first deal with it.

This action, as appears by the pleadings, is in the nature of an attack by the plaintiff upon an alleged will bearing date the 20th January, 1921, made by one Margaret Hannah Wilson, since deceased, of which the defendants Beatrice Maud Kinnear and Henry George White are the executors and also two of the beneficiaries thereunder. The other defendants, except Henrietta Elizabeth Hayden, are also beneficiaries, the defendant Hayden being the only other next of kin. The plaintiff alleges that the will was obtained by the undue influence of the defendants Beatrice Maud Kinnear and Henry George White, and further alleges that the deceased testatrix was not of a sound and disposing mind, memory, and understanding, and lacked testamentary capacity; and, further, that she was incapable of approving the contents of the will, which it is alleged did not express her testamentary intention. The Court is asked to pronounce against the will, and is also asked to decree probate of an earlier will, dated the 1st February, 1917.

A jury notice was served in due time on the part of the plaintiff, and the action was set down for and appeared upon the list of the jury sittings of this Court which commenced on the 12th October ult. On the 13th October, a motion was made before my Lord the Chief Justice of the Common Pleas, who was the presiding Judge at the jury sittings on that date within the meaning of Rule No. 398(3), to have the jury notice stricken out. In the

argument before me it was stated that the ground upon which the motion was based was that the service of the jury notice was irregular by reason of the provisions of sec. 56, subsec. 4, of the Judicature Act, which provides that subsec. 1 of that section shall not apply to causes, etc., over the subject of which before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction.

The jury notice was stricken out, and the action was transferred, according to the usual practice, to the non-jury sittings for the purpose of trial, the condition being imposed by my Lord the Chief Justice that the action should proceed to trial forthwith, or as speedily as it might be tried at the non-jury sittings. I will later refer more particularly to what took place upon the motion before the learned Chief Justice.

Dealing with the argument of the plaintiff's counsel that I have a right to summon a jury for this Court, I have been referred to secs. 45 and 78 respectively of the Jurors' Act, R.S.O. 1914, ch. 64, as justifying the course which I am now desired to take.

Section 45 is a general statutory provision authorising the Judges of the High Court Division to issue precepts to the Sheriff for the return of a proper number of grand jurors and petit jurors for the High Court sittings. This provision, as I understand it, was never intended to apply and has no application to a sittings such as that in which I am at present engaged. It is under this section that a precept is issued to secure the attendance in the regular manner of grand jurors and petit jurors at the assizes or jury sittings of this Court in Toronto and in each of the other county-towns throughout the Province, upon the dates fixed by the Judges of this Division for the holding of such sittings. Provision is made in the Judicature Act for the holding of a certain number of sittings in the county of York, and in the other counties of the Province, and the Judges of this Division are empowered to issue precepts for the calling of jurors for such of these sittings as will require the attendance of a jury. Further, as I understand the position, this non-jury sittings in Toronto commenced on a date in September last, and it was neither intended nor contemplated that a jury should be summoned for this Court, proper jury sittings being provided for this county at regular intervals throughout the year.

A perusal of sec. 78 with its various subsections, containing provisions for the calling of special juries, and providing, *inter alia*, that notice in writing of the desire for a special jury must be given

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to the opposite party at least 8 days before the first day of the sittings at which the case is to be tried, and other provisions as to the manner in which such special jury may be summoned, etc., satisfy me that this section has no application to a case like the present.

This part of the plaintiff's motion must therefore be dismissed.

Dealing with the other and main part of the application before me, I note that an appeal was taken from the order of my Lord the Chief Justice to a Divisional Court. The appeal was dismissed, the reasons for such dismissal appearing in the report in 57 O.L.R. 679, the judgment being read by Middleton, J.A. A preliminary objection had been taken on the part of the defendants that the appeal did not lie, and the Court gave effect to that objection. Middleton, J.A., stated that the case of *Brown v. Wood* (1887), 12 P.R. 198, has been regarded ever since it was decided as settling the law, the effect thereof being that an appellate court will not review the exercise by a Judge presiding at the trial of his discretion upon the question of trial with or without a jury. Mr. Justice Middleton further goes on to state that "there is no room for any distinction between the order made by a Judge under Rule 398(3) and an order made at the hearing."

Rule 398(3) provides that the Judge presiding at a jury sittings in Toronto may, in his discretion, strike out the jury notice and transfer the action for trial to a non-jury sittings, and this power may be exercised notwithstanding that the case is not on the peremptory list for trial before the said Judge.

My Lord the Chief Justice was the Judge presiding at the jury sittings in Toronto; this case was on the list for such sittings, although not upon the peremptory list for the day; and the order was made striking out the jury notice and transferring the action for trial to the non-jury sittings. According to the above quoted decision of the Divisional Court, an order made by my Lord the Chief Justice is in the same position as an order made at the hearing.

I was much pressed by counsel, in support of the application for adjournment, with decisions of the English Courts by which the advantages of a trial by jury in a case of this nature are strongly supported. It is undoubtedly true that in the English Courts it is the usual practice to try testamentary cases involving such questions as are involved here with a jury. It is, however, equally well settled that no such general practice obtains in this Province. The difference between the practice in England and the practice in our own Courts is referred to in numerous reported cases: for

example, in the case of *Jarrett v. Campbell* (1912), 26 O.L.R. 83, the late Chief Justice of the King's Bench referred to this matter. That was a case of an application for probate which was opposed, and the cause was transferred to the High Court for trial. A motion was made before Sir Glenholme Falconbridge, C.J., for trial by a jury, and the motion was refused. The grounds upon which the grant of probate was opposed were lack of testamentary capacity and undue influence. In the order transferring the cause from the Surrogate Court to the High Court, express reservation was made of the right of any party to apply for trial by a jury. The late Chief Justice refused a jury as above stated, and an application was made to the late Sir John Boyd, C., for leave to appeal to a Divisional Court. The late Chancellor refused the leave, and his reasons are given on p. 85 of the said volume of reports. It is not necessary to refer to other cases upon the same point, but many are to be found in our reports which illustrate quite clearly the practice which obtains here, such as *Re Lewis, Jackson v. Scott* (1885), 11 P.R. 107; *Dickson v. Monteith* (1887), 14 O.R. 719.

The case of *Wise v. Canadian Bank of Commerce* (1922), 52 O.L.R. 342, is of interest as shewing the attitude of the Courts in regard to appeals from the decision of a Judge upon an application to strike out a jury notice, and in regard to the effect of the Rules and sec. 56 of the Judicature Act.

In the argument I understood that the Judicial Committee of the Privy Council in the case of *Wilson v. Kinnear*, decided on the 30th March, 1925, had indicated their opinion in favour of the trial of that action by a jury. That action had to do with a later will made by the deceased. (See *Kinnear v. Wilson* (1922-3), 22 O.W.N. 253, 24 O.W.N. 282.) The only reference to the question of trial by jury or without in the reasons for judgment of the Judicial Committee, *Wilson v. Kinnear*, [1925] 2 D.L.R. 641, is to be found at the top of p. 646, where Lord Dunedin merely states the difference in the attitude of the Judicial Committee in respect of the verdict of a jury and that in respect of the decision of a Judge. I do not understand this as indicating anything more than what has just been stated; and, as has already been pointed out, the practice in this regard in our Courts differs in a very marked degree from that which obtains in the English Courts.

Reverting to the proceedings before my Lord the Chief Justice of the Common Pleas, when the motion was made before him to strike out the jury notice, I take from the copy of the notes of evidence furnished to me the following excerpt:—

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"His Lordship: Yes, I think I have the power to compel this case to be tried by a jury; the question is, should I?"

"This is a case that cannot very well be tried by a jury, and I see no reason why I should make an order that it be tried in this Court; it seems to me essentially a case for a non-jury sittings. The jury notice will be stricken out on condition that the defendants go to trial forthwith, which means at the earliest hour at which a non-jury court can hear it."

Then further on the following occurred:—

"Mr. McCarthy: Your Lordship realises the difficulty caused by the passing of the new Rule since the decision in *Bank of Toronto v. Keystone Fire Insurance Co.* (1898), 18 P.R. 113. If the non-jury Judge desires to have these issues determined by a jury he cannot have it.

"His Lordship: I suppose he has power to compel it? I have nothing to do with that."

It was urged before me that the decision of my Lord the Chief Justice was upon a motion to strike out the jury notice for irregularity; that the jury notice should never have been served; and that therefore the Chief Justice was not exercising the discretion contemplated by the Rules, but was merely making an order as of course.

It was further urged that the case was one in which, in the exercise of the discretion which counsel contended was vested in me as trial Judge, namely, to direct a trial by jury, I should do so or should postpone the trial until January so that the then trial Judge might be in a position to exercise a similar discretion if he thought fit to do so.

As I understand the practice, my Lord the Chief Justice of the Common Pleas, when this case came before him upon motion to strike out the jury notice for irregularity, had the power, if he saw fit in his discretion to exercise it, to direct that, notwithstanding the irregularity, the action should remain on the jury list and be tried with a jury. Whether that be so or not, it seems to me manifest from the language used by my Lord and quoted above, that he, if not exercising a discretion, was at least stating a definite opinion as to the propriety or the opposite of having this action tried by a jury, and that his opinion was quite clearly against such a trial. I have read the record in this action, and have also read the reasons for the decisions in the previous case of *Kinnear v. Wilson*, of the learned trial Judge, Middleton, J., the First Divisional Court, and the Judicial Committee of the Privy Council, and if the matter were now being presented to me as a

trial Judge with the request by one of the parties that the action should be tried with a jury, I would not be disposed to accede to such request. I entirely concur in the opinion which was expressed by my Lord the Chief Justice of the Common Pleas, as quoted above. I do not think the case is one which I, as trial Judge, would be prepared to try with a jury; and, in so far as any discretion is vested in me, that is my decision upon this motion.

Apart altogether from the above, the real question involved in this motion has already been considered by my Lord the Chief Justice, a Judge of long experience, and for whose opinion I entertain the deepest respect, and in my view it would not be seemly for me even to appear to sit in appeal from his decision.

As the motion for postponement of the trial was solely for the purpose outlined above, I dismiss the motion, with costs to the defendants in the cause.

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[APPELLATE DIVISION.]

BESINNETT V. WHITE.

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Dec. 1.

*Covenant—Restriction as to Use of Land Sold—Action to Enforce—Whether Purchaser from Covenantor Bound—Protection of other Land—Equitable Interest of Covenantee—Intention—Notice and Knowledge—Registry Act, R.S.O. 1914, ch. 124, secs. 71, 73.*

The judgment of ROSE, J., 57 O.L.R. 171, was affirmed.

The defendant, having in 1924 purchased a vacant lot of land from B., with full knowledge of the existence of a covenant made by B. in 1919, when the land was conveyed to B. by the plaintiff, "not to erect on the said premises a store or workshop and to use the said lands as a residence only," was *held* bound by the covenant. The plaintiff, at the time of the making of the covenant, although not the registered owner of the adjoining land, had an equitable interest therein, and took the covenant from B. to protect that interest, and not as a collateral and personal contract.

The exact nature of the ownership essential to a successful action has not been defined, but an equitable interest in the land to be benefited is sufficient. The question in each case is one of intention.

*Formby v. Barker*, [1903] 2 Ch. 539, 551, 554, and *London County Council v. Allen*, [1914] 3 K.B. 642, 653, 659, 672, applied.

*Millbourn v. Lyons*, [1914] 1 Ch. 34, [1914] 2 Ch. 231, distinguished.

It was argued that the covenant could not be enforced because the defendant, purchasing with full notice and knowledge of the covenant, found nothing on the face of the registered conveyances shewing facts which would establish the validity of the covenant:—

*Held*, that secs. 71 and 73 of the Registry Act had no effect in regard to the enforcement of the covenant. Moreover, these provisions are available only where the purchaser has taken without actual notice; there being actual notice, the defendant was put upon inquiry, and the facts could readily have been ascertained.

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APPEAL by the defendant from the judgment of ROSE, J., 57 O.L.R. 171.

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November 16 and 17. The appeal was heard by RIDDELL, MIDDLETON, MASTEN, and SMITH, J.J.A.

*J. M. McEvoy*, K.C., and *W. B. Henderson*, for the appellant, argued that the covenant was not binding upon him, because the plaintiff had not, at the time of the making of the covenant, such an interest in the adjoining property as to enable her to maintain the action: *Page v. Campbell* (1921), 61 Can. S.C.R. 633; *Playter v. Lucas* (1921), 51 O.L.R. 492; Halsbury's Laws of England, vol. 25, para. 828; *London County Council v. Allen*, [1914] 3 K.B. 642. The appellant, at the time of purchasing the land, found nothing on the face of the registered conveyances which would establish the validity of the covenant, and therefore the covenant should not be enforced against him.

*J. W. G. Winnett*, for the plaintiff, respondent, contended that, on the facts disclosed by the evidence, she had a sufficient equitable interest in the adjoining lands to give her the right to enforce the covenant; and that, as the appellant had "actual notice" of the covenant, the provisions of the Registry Act did not apply.

December 1. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by the defendant from the judgment of Mr. Justice Rose; pronounced on the 9th April, 1925, awarding the plaintiff an injunction restraining the defendant from violating the terms of the covenant hereinafter mentioned.

The material facts are simple. Elmwood avenue and Wortley road intersect at approximately right angles. On the south-west corner is a hardware store now owned by the defendant. On the west side of Wortley road, immediately south of the store, is a vacant lot, also owned by White, and south of this again is a property now owned by the plaintiff, and upon it there is now erected a residence.

Mrs. Besinnett (the plaintiff) formerly owned the vacant lot, having acquired title to it from her sister, Mrs. Slater, in 1904. On the 5th April, 1919, she conveyed this land to one Brown, who then owned the White store, taking from him, in the conveyance, a covenant "not to erect on the said premises a store or workshop and to use the said lands as a residence only." This covenant, it is said, was taken for the benefit of the land to the south, upon which the residence now stands.

This residence lot, together with the vacant lot, was purchased by Mrs. Slater in 1902, and, so far as the registry office shewed,

still stood in her name at the date of Mrs. Besinnett's conveyance of the adjoining vacant lot to Brown. The fact was, however, that in 1914, or some five years before the conveyance to Brown, Mrs. Slater, being indebted to her sister Mrs. Besinnett, made a verbal agreement to give her the residence lot in satisfaction of the debt. The agreement was not reduced to writing, nor was any conveyance made until the 11th September, 1919, some five months after the conveyance to Brown, when Mrs. Slater conveyed the lane to Ralph N. Slater, her son, for the expressed consideration of one dollar. Ralph N. Slater took this in trust for his aunt, for whom he had been acting as attorney in the management of her property, as she resided in New Jersey and was only occasionally in Ontario. Subsequently Mr. Slater conveyed the property to Mrs. Besinnett by deed dated the 17th September, 1920.

White purchased the vacant lot from Brown on the 16th October, 1924, and had full knowledge of the existence of the covenant in question, not merely notice to be implied by reason of the registration of the deed. He almost immediately erected two gasoline tanks opposite the vacant lot and proceeded to use the lot as though it were appurtenant to his store. He contends that, notwithstanding his knowledge of the covenant, it does not bind him, and that he holds the vacant lot free from its operation.

Upon action being brought, the defendant set up many defences which were all overruled by the trial Judge. Two of these alone call for extended consideration by us, as upon the argument of the appeal we expressed our concurrence with the view of our learned brother as to all others.

The first question to be considered is this: had Mrs. Besinnett at the time of the making of the covenant such an interest in the adjoining or residence property as to bring the case within the principle of the rule of *Tulk v. Moxhay* (1848), 2 Ph. 774, as modified by subsequent decisions?

I would first observe that this is a very different question from that presented when it is sought to ascertain whether at law a covenant runs with the land. The rule here invoked is purely equitable, a creature of the Courts, and does not depend upon any arbitrary legal principle as its foundation. The Court refrains from exercising its jurisdiction to restrain the breach of a negative covenant with reference to land and leaves the covenantee to his remedy, if any, at law, where it appears that the covenant was not made with respect to or concerning any specific property intended to be benefited, or where the plaintiff is no longer interested in the

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property intended to be benefited. The contrast in most of the cases is between ownership on the one hand and absence of any interest on the other, and counsel have been unable to refer us to any case, nor have I found any, in which the exact nature of the ownership essential to a successful action has been discussed. The cases are full of vague expressions amply sufficient for the matter then in hand, but useless here. I find in *London County Council v. Allen*, [1914] 3 K.B. 642, Lord Justice Buckley stating (p. 653) that the purchaser is not bound by the covenant "if the covenantee has no land adjoining or affected by the observance or non-observance of the covenant." In the same case Scrutton, L.J., after reviewing all the decisions (p. 672), states that "its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the possession of the covenantee or his assign, suing to enforce the covenant."

I find, however, two statements going to indicate that an equitable interest in the land to be benefited is sufficient. In *Formby v. Barker*, [1903] 2 Ch. 539, Romer, L.J., at p. 554, says: "If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object." The other statement is by Lord Justice Vaughan Williams in the same case, at p. 551: "There are cases in which restrictive covenants seem to have been enforced at the instance of plaintiffs, other than the vendor, for the benefit of whose land it appears from the terms of the covenant, or can be inferred from surrounding circumstances, that the covenant was intended to operate. In all other cases the restrictive covenant would seem to be a mere personal covenant collateral to the conveyance." In the same case Vaughan Williams, L.J., defined a covenant falling within the rule as "something arising from the relation of two estates one to the other," an expression which was adopted by Buckley, L.J., in *London County Council v. Allen*, [1914] 3 K.B. at p. 659.

From this I conclude that the question is in each case one of intention—was the covenant taken to protect or benefit land in which the covenantee had an interest, using this term in its widest sense, or was it merely personal and collateral to the conveyance? If the former, then so long as the interest intended to be protected remains, or is augmented as in the case in hand, there is no reason why the Court should not compel the covenantor, or those who

claim under him, with notice of the covenant, to regard the terms of the covenant. The question in each case is one of substance and reality and not of technicality.

Here there is no question that the plaintiff at the time the covenant was taken had a real and actual interest in the land, an interest that might have been defeated if the sister had chosen to repudiate her verbal contract, but it was nevertheless a real interest, and the covenant was taken unquestionably for the protection of that interest, and not as a collateral and personal covenant.

The case of *Millbourn v. Lyons*, [1914] 1 Ch. 34, [1914] 2 Ch. 231, discussing the effect of an agreement to purchase lands with a provision in the agreement calling for the user in a particular way of the lands bought, has here no application, for no one doubts that in order that the lands may be bound by the covenantor he must own the lands. That case determines that the equitable interest of a purchaser under an agreement is not "ownership" so as to make the covenant run with the lands. The obligation must depend upon the actual conveyance and the state of affairs at the date of the conveyance.

The second matter to be considered is the effect of the Registry Act. Mr. McEvoy argues that the defendant, on purchasing the land, as he did, with full notice and knowledge of the covenant, found nothing on the face of the registered conveyances going to shew the facts which, I think, establish the validity of the covenant, and that he was advised that, upon the facts as disclosed by the registered instruments, the covenant could not and would not be enforced.

This is based upon a curious misunderstanding of the effect of the provisions of the Registry Act. All that that statute does is to provide that an unregistered instrument affecting land "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice" (R.S.O. 1914, ch. 124, sec. 71), and that "no equitable lien, charge or interest affecting land shall be valid, as against a registered instrument executed by the same person" (*ib.*, sec. 73). Clearly the provisions of the statute have no application here. Furthermore each of these provisions is only available where the purchaser has taken "without actual notice." Here there was actual notice of the covenant, and this is sufficient to place the purchaser upon inquiry, when the actual facts could readily have been ascertained.

*Appeal dismissed with costs.*

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## [APPELLATE DIVISION.]

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*Bankruptcy—Sale of Goods to Debtor in Ontario by Vendor in Quebec — Place of Contract — Order Given in Ontario to Agent of Vendor — Acknowledgment — Goods to be Delivered F.O.B. Montreal and Payment to be Made there—Deliveries Made in Instalments—Acceptance by Taking into Stock—Whether New Contract Made on Acceptance of each Delivery—Quebec Contract Governed by Law of Quebec—Right of Dissolution—Provisions of Quebec Civil Code—Effect of Transfer of Goods to Ontario—Effect of Bankruptcy of Vendee—Demand for Goods—Sufficiency without Bringing Action.*

An order was taken in Ontario for certain goods, at a certain price, deliverable at a time mentioned, on terms f.o.b. at Montreal, price payable at Montreal, the order subject to approval of the vendors at Montreal, a card sent by the vendors acknowledging the receipt of the order and saying, "Same will receive our prompt attention," and the goods shipped from Montreal and accepted in Ontario as though received, without further communication, under the order:—*Held*, that, whether the card was or was not in itself a notification of the necessary approval by the vendors at Montreal so as to constitute an acceptance and a binding contract, the delivery f.o.b. at Montreal was a completion of the contract on the vendors' part, and the contract was a Quebec contract.

The proposition that there was no acceptance by the vendors at Montreal, but simply a succession of offers on their part, by sending the goods which had been ordered, offers which might or might not be accepted by the purchasers, and acceptance of which was manifested by their taking the goods into stock, so that instead of one contract there were several, was, upon the facts, not maintainable.

The contract, being a Quebec contract, was governed by the law of Quebec; under the rule of the Civil Law, the basis of Quebec law, the transaction had the effect of passing the possession of the goods over to the purchasers with a qualified property only, a property *sub modo*, not the absolute property in the Common Law sense; and the vendors had the right to dissolve the contract of sale while the goods remained in the possession of the purchasers.

The difference in the meaning and effect of the word "sale," or the corresponding word in other languages, at the Common Law and at the Civil Law, pointed out.

Articles 1025, 1027, 1472, 1473, and 1543 of the Quebec Civil Code considered.

The law of *locus contractus* governs as to goods sold in one country and taken in another so far as the ownership of property and its results are concerned; and the transfer of the goods to Ontario did not interfere with the vendors' rights.

Nor did the bankruptcy of the purchasers affect the vendors' rights. *Inglis v. Usherwood* (1801) 1 East 515. applied and followed.

There was no need to bring an action in order to effect a dissolution of the contract—a demand for the goods was sufficient to shew that the vendors dissolved it.

Judgment of FISHER, J., 57 O.L.R. 505, reversed.

AN appeal by the Royal Dress Company Ltd., of Montreal, from the judgment of FISHER, J., 57 O.L.R. 505.

November 18. The appeal was heard by RIDDELL, MIDDLE-  
TON, and MASTEN, JJ.A., and LOGIE, J.

*I. F. Hellmuth*, K.C., and *S. J. Birnbaum*, for the appellants, argued that the contract for the sale of the goods in question had been made in Quebec, and so the law of that Province governed in interpreting the contract: *Dominion Bridge Co. v. British-American Nickel Corporation Ltd.* (1924), 56 O.L.R. 288; *Rogers v. Mississippi and Dominion Steamship Co.* (1888), 14 Que. L.R. 99; *Re Komer* (1925), 27 O.W.N. 467, 5 C.B.R. 515; *Benaim & Co. v. C. S. Debono*, [1924] A.C. 514; *Rhode Island Locomotive Works v. South Eastern Railway Co.* (1886), 31 L.C. Jur. 86; Dicey on Conflict of Laws, 3rd ed., p. 707; *Livesley v. Horst Co.*, [1924] Can. S.C.R. 605; *Bigelow v. Craigellachie-Glenlivet Distillery Co.* (1905), 37 Can. S.C.R. 55; *Perras v. Grace* (1918), Q.R. 27 K.B. 343; *Re Columbia Shirt Co.* (1922), 23 O.W.N. 18, 3 C.B.R. 268. Therefore, under art. 1543 of the Quebec Civil Code, the vendors were entitled to a dissolution of the contract and a return of the goods, even when the goods were in the hands of the trustee in bankruptcy: *In re Eastgate*, [1905] 1 K.B. 465; *In re Rosenzweig* (1920), 1 C.B.R. 385, 431, affirmed in (1921) 2 C.B.R. 255; *Tilley v. Bowman Ltd.*, [1910] 1 K.B. 745. Nor did the transfer of the goods to Ontario interfere with the vendor's rights: Story on Conflict of Laws, 8th ed., pp. 563, 564.

*L. M. Singer*, for the trustee in bankruptcy, respondent, contended that the law of the place where the movables were found (in this case, Ontario) governed: *Inglis v. Usherwood* (1801), 1 East 515; Westlake's Private International Law, 6th ed., p. 187. The card sent by the vendors saying that the matter would receive prompt attention was not an acceptance of the purchasers' offer to buy: Williston on Contracts, vol. 1, p. 127; *Oxendale v. Wetherell* (1829), 9 B. & C. 386; *McCool v. Grant & Dunn* (1921), 48 O.L.R. 630. Each delivery of a part of the goods was an offer, and the placing of the goods in stock by the purchasers was in each separate case an acceptance. Assuming that the Quebec law applied, the vendors did not bring themselves within it, because a mere demand was not dissolution of the contract under art. 1543 of the Code: *Re Geller Brothers* (1923), 54 O.L.R. 283, 4 C.B.R. 108. For the dissolution of the contract, the vendors should have sued in Ontario.

December 1. RIDDELL, J.A.:—The facts are carefully and accurately found in the reasons for judgment, and the questions for decision here are purely of law.

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The first question is, "Is the contract a Quebec contract?"

On that point there seems to me, with great respect, to be no room for doubt. An order is taken in Ontario for certain goods, at a certain price, deliverable at a time mentioned, on terms f.o.b. at Montreal, price payable at Montreal, the order "subject to approval of the firm" at Montreal, a card sent by the firm acknowledging the receipt of the order and saying, "Same will receive our usual prompt attention," the goods shipped and accepted as though received without further communication under the order—what must necessarily follow as to the place of making the contract, the *locus contractus*?

It is argued (1) that to complete the contract there must be an approval by the firm at Montreal, and (2) that what took place was not an approval—at least not an approval notified to the purchaser.

As to the first proposition, there can be no doubt, and it is not disputed.

As to the second, it is argued that the card was not a notification of the approval so as to constitute an acceptance and a binding contract.

For this, Professor Williston's work on Contracts, vol. 1, p. 121, is cited as authority; the cases relied upon for the statement are decisions of respectable and respected Courts, and, were there nothing more in this case than the card, they would be in point.

In *Manier & Co. v. Appling* (1896), 112 Ala. 663, 20 So. Repr. 978, the plaintiffs delivered to the agent of the defendant "a proposal for the purchase of the shoes at specified prices and on specified terms" (p. 668). The only answer was a card saying, "The same shall have prompt attention." The goods were not delivered, and the plaintiffs, bringing an action on what they considered a contract of sale, failed. There is an elaborate discussion on the meaning of the words of the card.

In the Kentucky case, *Courtney Shoe Co. v. E. W. Curd & Son* (1911), 142 Ky. 219, 134 S.W. Repr. 146, 38 L.R.A. (N.S.) 903, the facts were much the same. The card acknowledging receipt of an order for shoes promised "our prompt and careful attention." The shoes were not delivered, and the purchaser failed in an action for non-delivery.

So in New York, *Von Keuren v. Boomer & Boschert Press Co.* (1911), 143 App. Div. (N.Y.) 785, 128 N.Y. Supp (162 N.Y. St. Repr.) 306, a similar order for goods, subject to acceptance by the manufacturer, and acknowledged by a card saying that it

"will have our best attention," was held not to bind the manufacturer to supply the goods.

*National Cash Register Co. v. McCann* (1913), 140 N.Y. Supp. (174 N.Y. St. Repr.) 916, 80 N.Y. Misc. 165, is nearer in its facts to the present. There, an order was sent in by the defendant to the plaintiffs, which was acknowledged by a card, "It will have our best attention." But the order was that the article was to be shipped as soon as possible, and while the plaintiffs shipped they failed to prove that it was shipped as soon as possible. The Court held that the card did not constitute an acceptance; but, assuming that a contract had been made, held that the plaintiffs had not carried it out, and therefore could not succeed.

It is wholly unnecessary in the present case to decide whether, had the card stood alone, a contract could be considered concluded: it might mean only that the Royal Dress Company (the appellants) would think it over and decide, but it must certainly mean that they would make up their mind before delivery, and that delivery would shew that their mind had been made up approving the order. There is no pretence that they did not fulfil their contract. The delivery f.o.b. at Montreal was a completion of the contract on their part, and there can be no doubt that the contract was a Quebec contract: *Dominion Bridge Co. v. British-American Nickel Corporation Ltd.*, 56 O.L.R. 288.

The proposition that there was no acceptance by the Montreal company, but simply a succession of offers on their part by sending the goods which had been ordered, offers which might or might not be accepted by the purchasers, and acceptance of which was manifested by their taking the goods into stock—so that instead of one contract there were several—seems to have recommended itself to my brother Fisher, but I think it under the facts fundamentally unsound. Probably both parties would have been startled at and would have vigorously repudiated such an idea.

What follows from this conclusion is the important matter for determination. Most of the confusion in this case arises from the difference in meaning and effect of the word "sale," or the corresponding word in other languages, at the Common Law and at the Civil Law. In order to arrive at the proper conclusion we must bear this difference in mind—it was agreed on the argument that we might determine foreign law by examining authorities, text-writers, decisions.

It is elementary that a sale under the Common Law vests the property in the purchaser—*ipso facto* the property passes at latest on delivery. But at the Roman Law a transfer of property was

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not complete by the sale or even by the delivery of the property without payment or security for the price (unless, indeed, there was an express or implied general credit).

"*Quod vendidi non aliter fit accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine datum, vel etiam fidem habuerimus emptori sine ulla satisfactione.*" Digest, XVIII., 1, 19; Id. XIV., 4, 5, 18; cf. Story on the Conflict of Laws, 8th ed., p. 563.

Our Province (except for the few months before the Act (1792) 32 Geo. III. ch. 1, U.C.) has been a Common Law Province; Quebec (with the doubtful exception of the *Régime Militaire* and the still more doubtful period from 1764 till the coming into force of the Quebec Act of 1774, 14 Geo. III. ch. 83, Imp.), a Civil Law Province.

Beyond question, had the transaction taken place in Ontario, the goods when delivered for transmission f.o.b. would have become the property of the purchasers, but in Montreal under the rule of the Civil Law, the basis of Quebec law as of ancient and modern French law, it was not so—the transaction had the effect merely of passing the possession over to the purchasers with a qualified property only, a property *sub modo*, not the absolute property in our Common Law sense.

The Quebec law defines sale in the Civil Code, art. 1472, as follows: "Sale is a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay for it. It is perfected by the consent alone of the parties, although the thing sold be not then delivered; subject nevertheless to the provisions contained in article 1027 and to the special rules concerning the transfer of registered vessels." (The special matters referred to are not of importance here). It does not require delivery to complete a sale, as is made plain by this article and art. 1025: "A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent of the parties, although no delivery be made. The foregoing rule is subject to the special provisions contained in this code concerning the transfer and registry of vessels."

But it is also carefully provided that a contract of sale shall be subject to the same rules as other contracts. Article 1473 reads:—

"The contract of sale is subject to the general rules relating to contracts and to the effects and extinction of obligations declared in the rule *Of Obligations*, unless it is otherwise specially provided in this code."

In sales when the price is unpaid there is no right *per se* to dissolution if the article sold is an immovable: art. 1536; but if it be a movable the right exists if exercised while the thing remains in the possession of the purchaser.

Article 1543 reads: "In the sale of movable things the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer, without prejudice to the seller's right of revendication as provided in the title *Of Privileges and Hypothecs*. In the case of insolvency such right can only be exercised during the thirty days next after the delivery."

This right to dissolution is not simply a privilege: it inheres in the contract itself and controls the title—so long as the goods are in the hands of the purchaser unpaid, he has not an absolute title in the Common Law sense: he can sell and give a better title than he himself has, and yet his ownership is not ownership in the Common Law sense but ownership *sub modo* only.

The law of *locus contractus* governs as to goods sold in one country and taken in another so far as the ownership of property and its results are concerned.

In *Benaim & Co. v. C. S. Debono*, [1924] A.C. 514, the appellants in Gibraltar, by a Gibraltar contract, sold certain anchovies to the respondents, merchants in Malta, f.o.b. Gibraltar, but to be dealt with in Malta. The respondents dealt with them in such a way that they lost the right to reject them if the law of Gibraltar and not the law of Malta applied. The Judicial Committee held that "the contract between the parties, and the performance of it, is subject to the law of Gibraltar;" the property passed according to that law and no right of rescission could be successfully claimed.

It was argued before us that *Inglis v. Usherwood*, 1 East 515, was to the opposite effect, but, properly understood, it tells the other way. There, one Crane had in London chartered a ship with the defendant as captain to load for him at St. Petersburg certain goods there to be bought on his account by his factors. The factors loaded these goods on the ship at St. Petersburg; but, Crane becoming bankrupt, they claimed the goods under a Russian ordinance which gave an unpaid vendor the right to repossess the goods sold in case of bankruptcy of the purchaser. The captain gave the vendor a bill of lading of the goods and brought them to England. The assignee in bankruptcy of Crane demanded the goods, tendering freight charges and expenses. The captain refused, and delivered them over to the holder of his bill of lading. The assignee sued the captain in trover, claiming in effect that

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the goods were Crane's and that the captain was guilty of conversion. The answer was that the goods were not Crane's. The Court of Queen's Bench decided that while delivery on board to an agent would in England have passed the property, it was not so in Russia; the law there was that in case of insolvency of the purchaser, the goods sold were, on and after delivery, still "in effect . . . kept *in transitu*," and considered them as *in transitu*, i.e., the unpaid vendor was considered as not having "delivered" them so as to pass the property. In that case the contract under consideration was not that between Crane and the defendant; the action was not in contract but in trover. The contract under consideration was that in execution of which the goods were put on board. This apparently was a Russian contract; at all events the vendors lived in Russia, the delivery was in Russia, and the payment was to be made by drafts drawn in Russia. The Court held that under this contract the delivery of the goods should not, as in England, pass the title to Crane, but have the effect given it by the Russian law.

It is a matter of indifference for the purpose of this case whether the decision was based upon the locus of the delivery or the locus of the contract. In either case it applies to give to the delivery f.o.b. in Montreal the effect of the Quebec law.

We are not concerned with the justice or otherwise of this law, but it is not out of place to quote the language of Lord Chief Justice Kenyon, who cannot be accused of having too low an opinion of the Common Law. He says (1 East at p. 524): "The law of Russia in this respect is a very equitable law; and I have often lamented that our own code was defective in the same particular. For every man contracting to supply another with goods acts on the presumption that that other is in a condition to pay for them; and therefore when the condition of the consignee is altered at the time of delivery, and he is insolvent, and no longer capable of performing his part of the contract, honesty and good faith require that the contract should be rescinded. However the contrary has been settled to be law, unless the consignor stop the goods *in transitu* before they get into the consignee's possession. But this being a transaction in a foreign country, where a more equitable law in this respect prevails, I am far from being desirous of limiting its operation."

This, too, was a case of bankruptcy of the original purchaser. That circumstance was not considered to have affected the right of the unpaid vendor.

The next question is: Did the transfer of the goods to Ontario interfere with the vendors' rights?

The rule is that a right *in rem* is "not . . . displaced by the mere change of local situation of the property:" Story, Conflict of Laws, 8th ed., pp. 563, 564, sec. 402.

In the Maritime Courts this rule is firmly established by decisions in the Privy Council and House of Lords: *Harmer v. Bell* (1851), 7 Moore P.C. 267, especially at pp. 284, 285, approved in Dom. Proc. in *Currie v. McKnight*, [1897] A.C. 97. But Admiralty Law and Common Law are not always the same, and Common Law authority must be sought. The case of *Inglis v. Usherwood* again comes to the rescue. As we have seen, the goods came to London and were there demanded by the assignee, who tendered the freight charges and expenses, but the captain actually delivered them to the holder of the bill of lading. The rights of the unpaid vendor were not diminished in that regard by the transfer from the Civil Law to the Common Law country.

Of course I am not discussing the result if there were an express statute in the country to which the goods were removed, as in *Marsh's Administrator v. Elsworth* (1860), 37 Ala. 85, and *Donald & Co. v. Hewitt* (1859), 33 Ala. 534.

As to the effect of the bankruptcy of the purchasers, we have seen that in *Inglis v. Usherwood* it made no difference. Nor does our statute—the general rule that the trustee takes no more than the insolvent can give him is not interfered with (except in certain cases of fraud, etc., not in point here). All the property of the insolvent is to be for the benefit of his creditors, but not the property of some one else.

Some point was endeavoured to be made of the failure of the vendors to take legal action, that is, to bring an action in the Ontario Courts. This is not unlike the statement made in *Inglis v. Usherwood* that the vendors did not "give notice to the head judge of the Court," but only demanded a bill of lading. I can find no provision in the Quebec law or in ours that to effect a dissolution of the contract of sale under the Code, action must be taken at law; a demand for the goods is sufficient to shew that the vendors dissolve the contract. Cf. *New Ontario Colonization Co. Ltd. v. Grand Trunk Railway System* (1925), 57 O.L.R. 244, and cases cited, especially *Bohtlingk v. Inglis* (1803), 3 East 381, a case arising out of the circumstances of *Inglis v. Usherwood*. When the goods came to London from St. Petersburg in Usherwood's ship, the vendors sent the bill of lading of part of the goods to their agent Schneider in England, who demanded the goods. The captain, on being indemnified by Inglis, the assignee of Crane, refused to give them up to Schneider, and gave them to Inglis.

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The vendors sued the assignee in trover, and it was held that the vendor was entitled to the goods as against the assignee.

I think the judgment appealed from cannot be supported in law and that the appeal should be allowed with costs here and below.

MIDDLETON, J.A., and LOGIE, J., agreed with RIDDELL, J.A.

MASTEN, J.A.:—Contrary to some of the views which I entertained on the argument, I now agree in all respects with the judgment which has been prepared by my brother Riddell, and am of opinion that the contract in question was made in Montreal and was and is governed by the law of Quebec; that the purchasers by their contract took only what the Quebec law respecting sales of goods gave them; that their title was subject to the right of rescission which that law prescribes; that there was no accretion to the vendees' title and no diminution of the vendors' rights when the goods were transported into Ontario; and that the trustee in bankruptcy stands in no higher position towards the vendors than did the bankrupt.

*Appeal allowed.*

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[APPELLATE DIVISION.]

1925.

RE SCOTT.

Dec. 1.

*Will—Construction—Devise and Bequest of "Entire Property" to Wife with "Power of Control"—Absolute Ownership—"Wish" that Sister should "Inherit what Remains" at Death of Wife—Repugnancy.*

The judgment of MEREDITH, C.J.C.P., 57 O.L.R. 381, was reversed. In the will before the Court for interpretation the testator's wife was given his entire property, both real and personal, with full power to control the same and dispose of the landed property—in other words, the absolute ownership; and the gift to another of what should remain in the hands of the widow at the time of her death was repugnant to the absolute estate—and failed.

*Re Walker* (1925), 56 O.L.R. 517, followed.

AN appeal by the administrator of the estate of Ida Scott, deceased, from the judgment of MEREDITH, C.J.C.P., 57 O.L.R. 381.

November 19. The appeal was heard by RIDDELL, MIDDLETON, and MASTEN, J.J.A., and GRANT, J.

*D. L. McCarthy*, K.C., for the appellant, argued that the testator made an absolute gift of personalty to his wife, and then expressed a wish that what was left should go to some one else. This brought the case within one of the rules laid down in *Re Walker* (1925), 56 O.L.R. 517, that where the testator intended a beneficiary to take absolutely, he could not make a gift over of what might remain on the death of the first beneficiary.

*S. H. Bradford*, K.C., for the adult children of Sarah Higgins, respondents, contended that the gift to the testator's wife was not absolute, but was of something in the nature of a life-estate with the use of so much of the corpus as she desired, and then what remained to go to some one else. This kind of life-estate was referred to in *Re Walker* (*supra*). Counsel also referred to *In re Sanford*, [1901] 1 Ch. 939; *Re McClennan* (1925), *ante* 24; *Shearer v. Hogg* (1912), 46 Can. S.C.R. 492. As to the word "wish," he submitted that, as here used, it meant "will."

*Lyle Ramsey*, for the Official Guardian, respondent, submitted that the words of the will could be read to mean a gift of less than an absolute estate. "Control" meant only during the widow's life.

December 1. MIDDLETON, J.A.:—Appeal from the judgment of the Chief Justice of the Common Pleas, pronounced on the 4th June, 1925, construing the last will and testament of Arthur Scott.

In the preparation of the will, evidently a ready-made will form was used, but the draftsman was apparently somewhat illiterate. This accounts for the combination of very formal and technical, though utterly inapt, language in parts of the document and the homely and inartificial language of other parts. Fortunately, the rights of the parties depend upon the latter portion only. It reads:—

"My wife Mrs. Ida Scott of the above named place following property My Entire property both real and pessionally to have and to hold with full power to controle the same. But it is the wish of the Testator that as soon as possible after his death that the said Ida Scott shall sell and dispose of all landed property in my hands at the time of my death as soon after as possible. It is also the wish of the testator Arthur Scott that after his death the said Ida Scott is to pay to Miss Sarah Higgins sister of Arthur Scott resident of Saskatoon the sum of three hundred dollars that is to say after the said Ida Scott has sold and received pay for the said real estate of testator. It is also the wish of the said

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Arthur Scott that the said Sarah Higgins at the time of the death of Mrs. Ida Scott inherit whatever property remeng in her hands at the time of her death."

The learned Chief Justice has determined that, upon the death of Ida Scott, Sarah Higgins took all the property of the deceased then remaining in the hands of Ida Scott.

The question presented is not distinguishable from that considered by us in *Re Walker*, 56 O.L.R. 517, and it is not necessary to review the matters there fully discussed. As we there pointed out, the cases in which a testator after apparently conferring a benefit purports to deal with the property upon the death of the person upon whom the first benefit is conferred fall into two classes: first, those in which the later provision shews that the first taker was not intended to take absolutely, but was intended to have a life-estate only; and the second in which it was clear that the first taker was intended to take absolutely, and, therefore, the attempted gift over of all that might remain on the death of the first taker was repugnant and void, and that in each case the problem was to determine within which of the classes the particular will under consideration fell.

It was also pointed out that there is a third class of cases constituting an exception to the first class: cases in which the first taker had only a life-estate, but there was in addition the right to the first taker to eneroach upon the corpus of the estate.

In the will here in hand the wife was given the testator's entire property both real and personal, with full power to control the same and to sell and dispose of the landed property: in other words, she was given the absolute ownership; and the gift to Mrs. Higgins of what should remain in the hands of the widow at the time of her death was clearly repugnant to the absolute estate first given to the widow, and failed.

I can find nothing in the will to justify the view that all that was given to the widow was a life-estate, or a life-estate with power to encroach upon the corpus. The expression to have and to hold with full power to control the same does not, to my mind, indicate any intention to cut down the ownership, but rather a desire to emphasise the absolute nature of the gift to her. Nor can I find any significance in the use of the thrice recurrent phrase "it is the wish." I read that as equivalent to words of gift. Nor do I find any significance one way or the other in the use of the word "inherit" as applied to the gift to Mrs. Higgins. It is quite inapt, in any possible view of the case, for one does not inherit under a will, but only upon an intestacy. It is plain to

me that what the testator intended was to give absolutely to his wife and to control, upon her death, the destiny of that which he had already given, something which can be done under the Civil Law, but which cannot be done under the Common Law.

I think the appeal should be allowed and that the costs here and below should be paid out of the estate.

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RIDDELL, J.A.:—Were the case not governed by binding authority, I should, I think, support the judgment appealed from—as the law stands authoritatively declared, I agree that the appeal must be allowed.

MASTEN, J.A., and GRANT, J., agreed with MIDDLETON, J.A.

*Appeal allowed.*

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[APPELLATE DIVISION.]

[IN BANKRUPTCY.]

RE WALKEAM.

1925.

*Bankruptcy—Claim against Estate of Bankrupt—Money Lent by Former Partner—Declaration of Dissolution not Registered—Partnership Registration Act, secs. 7, 8—Continuance of Partnership—Proof of Claim—Competition with Creditors of Firm and of Bankrupt Partner.*

June 30.  
Dec. 2.

The debtor and his brother, in 1920, entered into partnership in a retail business, and registered a declaration of co-partnership pursuant to the Partnership Registration Act, R.S.O. 1914, ch. 139. In 1921 the partnership was dissolved, but no declaration of dissolution was registered. After the dissolution, the debtor borrowed money from his brother, and in 1924 the debtor was adjudged bankrupt:—*Held*, that, by the effect of secs. 7 and 8 of the Act, the debtor's brother remained a partner in the firm, and could not prove his claim for the money which he lent so as to compete with the creditors of the firm, nor rank as a separate creditor of the bankrupt before the creditors of the firm were paid in full.

*Bank of Toronto v. Nixon* (1879), 4 A.R. 346, distinguished.

APPEAL by Ameen Walkeam, brother of Edward Walkeam, the debtor, from the disallowance, by the trustee in bankruptcy of the estate of the debtor, of the claim of the appellant against the estate.

1925. June 26. The appeal was heard by FISHER, J.  
RE *Lewis Duncan*, for the appellant.  
WALKEAM. *G. D. Balfour*, for the trustee.

June 30. FISHER, J.:—The facts are as follows. On the 9th January, 1920, Edward Walkeam and Ameen Walkeam executed a declaration of copartnership, under the firm name of "Art Silk Company." The declaration was registered on the 12th January, 1920. The business of the firm was that of retail dealers in curios and fancy goods. On the 24th August, 1921, Ameen Walkeam sold out his interest in the firm to his brother Edward for \$7,200, and the then creditors of the firm were notified, in writing, of the change in the firm. Four of the letters written to creditors by the firm were put in. They are all in the same form, and one of them reads as follows:—

"Toronto, August 24, 1921. Dear Sirs: You hereby take notice I'm the undersigned (Ameen Walkeam) this 24th day of August have sold my entire interest in the Art Silk Company to Mr. Edward Walkeam, who has taken responsibility of the present and future debts of the said company. I remain, yours truly, The Art Silk Company, per A. Walkeam."

Ameen Walkeam swore that he had been paid in full by his brother, and thereafter, between the 12th July, 1922, and the 12th August, 1924, his brother borrowed from him \$3,868.25. On the 12th October, 1924, on a petition of a creditor named Bardawell, a receiving order was made adjudging Edward Walkeam, carrying on business under the firm name and style of "Art Silk Company" at Toronto, in the Province of Ontario, a bankrupt. The claimant filed with the trustee appointed by the creditors a detailed statement of his account, and the trustee disallowed the account on the 18th April, 1925. From this disallowance the claimant appeals, and the two questions for determination are: (1) the *bona fides* of the claimant's account filed and disallowed; and (2) whether the claimant was, at the time Edward Walkeam was declared bankrupt, a member of the firm known as the "Art Silk Company."

The trustee contends that, as Ameen Walkeam did not register a declaration of dissolution of the firm, as required by sec. 7 of the Partnership Registration Act, R.S.O. 1914, ch. 139, he continued a partner thereof down to the date of the receiving order (sec. 8); and, he being a partner, there is no liability on the part of the trustee to pay his account.

Counsel for the claimant contends that the loans were made

*bonâ fide* to his brother, personally, that all the creditors of the firm were notified of the dissolution, and that he is not now a partner nor liable as such.

The claimant was examined before me under oath, and established to my satisfaction that he did sell out all his interest in the firm to his brother in August, 1921, that the then creditors of the firm were notified of the change, and that the failure to register a declaration of dissolution was by oversight; and he also satisfied me that he did subsequently make the loans as set out in his account, and that he has not been repaid. He produced cheques for all the loans made, and a telegraph order for \$275, one of the items in the account.

Counsel for the trustee urged that, if it be found that Ameen Walkeam was a member of the firm, a receiving order should be made declaring him a bankrupt, but no such order could be made on this application, or otherwise than as provided in the Act, upon due notice to Ameen Walkeam.

On the evidence before me I find as a fact that the partnership between Edward Walkeam and Ameen Walkeam was dissolved and that as between themselves Ameen is not a partner; but it is possible that Ameen may have made himself liable to creditors who dealt with Edward after the dissolution by reason of the non-registration of notice of dissolution. No petition was presented or could be entertained against the firm *quâ* firm, and the receiving order in this matter has simply adjudged Edward Walkeam bankrupt. The law is well-settled that a firm cannot be adjudged bankrupt in the firm name; and in order to put a firm in bankruptcy all the members thereof must be individually named as respondents. See *Wabi Iron Works Ltd. v. Patricia Syndicate* (1923), 54 O.L.R. 640; *Ex p. Blain* (1879), 12 Ch. D. 522; and *Re John Noble & Son* (1924), 27 O.W.N. 107, 5 C.B.R. 147. But, even if Ameen Walkeam were a partner, the proceedings against Edward alone are authorised by sec. 69 (1) of the Bankruptcy Act.\*

On an appeal by Ameen Walkeam from the disallowance of his claim, I do not see how it is possible for me to make an order declaring him a member of the firm, and as such adjudge him a bankrupt. It seems to me that if any creditor of the Art Silk Company now desires to fasten a personal liability on Ameen Walkeam it will be necessary to take proceedings against him and

\* 69. (1) Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others.

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Fisher, J. give him an opportunity of opposing the same; but, as the matter  
1925. now stands, I have no jurisdiction to make a receiving order  
against him.

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Any creditor claiming that Ameen Walkeam is liable to him as a partner can bring an action in a court outside of bankruptcy to recover any sum alleged to be owing by him as a member of the firm, and also to have it declared that he was a partner, or liable as a partner, in the firm; and, if such an action succeeds and Ameen Walkeam fails to pay, a petition could be presented and he be declared a bankrupt, and thereupon any debt due by Edward Walkeam to him could be made available for the claims of his individual creditors, and therefore the claims of the creditors of the partnership. It may be, as urged by the learned counsel for the trustee, that the creditors are entitled to proceed against, and hold liable, all members of a registered partnership, until a declaration of dissolution is registered as required by the statute (*supra*), even if they did not know at the time they extended credit to the firm that a certain person was a member thereof; but, holding, as I do, that I cannot on this application consider that point, it is not necessary for me to refer to the authorities relied on by the learned counsel for the trustee.

The position of the matter is simply this. Edward Walkeam has been adjudged a bankrupt, and Ameen Walkeam has proved a debt against him which he is entitled to recover, irrespective of the question whether or not Ameen Walkeam was a partner or liable as a partner of Edward Walkeam, it being an individual debt of Edward to Ameen, which is entirely unaffected by the question of partnership.

The appeal will be allowed with costs, which I fix at \$75. The trustee is entitled to his costs payable out of the estate, if he was acting under the direction of the inspectors; and the order is to be without prejudice to any claim which any creditor may have against Ameen Walkeam.

The trustee appealed from the order of FISHER, J.

November 4. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJA.

T. Sheard, for the appellant, argued that the learned Judge below erred in holding that the claimant was entitled to rank as a creditor of the partnership, the Art Silk Company. No declaration of dissolution was filed after Ameen Walkeam retired from the partnership, as required by sec. 7 of the Partnership Registration Act; and so, under sec. 8 of that Act, Ameen remained a

partner, as against creditors of the Art Silk Company: Canadian Encyclopædic Digest (Ont.), vol. 1, p. 406.

*L. Duncan* and *A. Greenbaum*, for Ameen Walkeam, respondent, contended that there had been a complete dissolution, not a mere change in the *personnel* of the partnership, and that sec. 8 of the Partnership Registration Act did not apply: *Bank of Toronto v. Nixon* (1879), 4 A.R. 346; *Ex p. Sheen* (1877), 6 Ch. D. 235; *Cassidy v. Henry* (1871), 31 U.C.R. 345.

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December 2. The judgment of the Court was read by MASTEN, J.A.:—This is an appeal by the trustee in bankruptcy from the judgment of Fisher, J., dated the 30th June, 1925, whereby he held that Ameen Walkeam was entitled to rank as a creditor on the estate of Edward Walkeam, trading as Art Silk Company.

The facts are that Edward Walkeam and Ameen Walkeam entered into partnership under the name of "Art Silk Company" on the 2nd January, 1920. The trade or business to be carried on was that of retailing curios and fancy goods in the city of Toronto. On the 9th January, 1920, the partners executed a declaration of copartnership pursuant to the Partnership Registration Act, R.S.O. 1914, ch. 139, and such declaration was registered by them on the 12th January, 1920.

By the judgment in appeal it is found that on the 24th August, 1921, Ameen Walkeam sold out his interest in the firm to his brother Edward for \$7,200, and the then creditors of the firm were notified in writing of the change in the firm. Edward continued the business under the same name, "Art Silk Company." In the course of his reasons for judgment Fisher, J., says:—

"The claimant was examined before me under oath, and established to my satisfaction that he did sell out all his interest in the firm to his brother in August, 1921, that the then creditors of the firm were notified of the change, and that the failure to register a declaration of dissolution was by oversight; and he also satisfied me that he did subsequently make the loans as set out in his account, and that he has not been repaid. . . . On the evidence before me I find as a fact that the partnership between Edward Walkeam and Ameen Walkeam was dissolved and that as between themselves Ameen is not a partner; but it is possible that Ameen may have made himself liable to creditors who dealt with Edward after the dissolution by reason of the non-registration of notice of dissolution."

These findings are not in controversy on the present appeal, the sole question raised by the trustee being based on the fact that

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1925. declaration certifying the dissolution of the partnership, as provided in sec. 7 of the Partnership Registration Act, was ever made or filed, and that under sec. 8 of the Act Ameen Walkeam stands in the position of a partner. That section provides that "until a new declaration is made and filed by him or by his partners or any of them, no person who signed the declaration filed shall be deemed to have ceased to be a partner." Ameen Walkeam signed the declaration filed and therefore remains a partner as against creditors of the Art Silk Company.

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Upon the findings of fact of Fisher, J. (which, as I have said, are not disputed on this appeal), it must be held that as between Ameen Walkeam and Edward Walkeam the partnership was dissolved, and that Ameen Walkeam is a separate creditor of Edward Walkeam for \$3,863.25. If it should turn out in the bankruptcy proceedings that a surplus remains to Edward Walkeam after all creditors of the Art Silk Company are paid in full, then Ameen Walkeam will be entitled to claim on that surplus, but the statute, as I have quoted it, is imperative, and as against creditors of the Art Silk Company the rule is as stated by Pollock on Partnership, 11th ed., p. 171:—

"Where the joint estate of a firm or the separate estate of any partner is being administered, no partner in the firm may prove in competition with the creditors of the firm either against the joint estate of the firm or against the separate estate of any other partner until all the debts of the firm have been paid."

See *In re Dixon* (1874), L.R. 10 Ch. 160; *Nanson v. Gordon* (1876), 1 App. Cas. 195; *Re General Fibre Board Syndicate* (1923), 25 O.W.N. 304, 4 C.B.R. 364.

"This rule applies to a person who, not being in fact a partner, has, by holding himself or allowing himself to be held out as a partner, become liable as such to the creditors of the firm generally: *Ex p. Hayman* (1878), 8 Ch.D. 11."

Mr. Duncan refers to *Bank of Toronto v. Nixon*, 4 A.R. 346, but that case is clearly distinguishable, for there the business was not continued in the name of the former partnership (Thomas Nixon & Son), but on the contrary with different partners and under a different name (Nixon & Co.). The action was brought on a promissory note signed by James Nixon in the name of Thomas Nixon & Son, and the Bank of Toronto when they took the note sued on had actual notice that the old firm of Thomas Nixon & Son had been dissolved two years before. Counsel for the appellants (Bethune, Q.C.) admitted that the Partnership Registration Act applied where (as here) the name of

the business was not changed but some of the members retired or new ones were introduced, his contention being that in the case then before the Court the Act did not apply, because there had been an entire dissolution of the firm, and to this argument the Court gave its assent. Morrison, J.A., at p. 351, says: "No provision was made, as I have said, in that Act for the making and the registration of a declaration of a total dissolution of a registered partnership. It is true that the retiring of a member of a firm would operate in law as a dissolution of the partnership, but among commercial men the retirement of a member of a firm, or the addition of a new member, is not considered a complete dissolution of the firm, and we may fairly assume that the framers of the Act had in view that state of things, and so provided for the registration of a new declaration when such an alteration or change took place, and to estop a retiring partner from setting up that he ceased to be a partner, if he omitted to file such a declaration."

For these reasons, I am of opinion that the case cited has no application to the facts of the present appeal.

I have examined the cases of *Ex p. Sheen*, 6 Ch.D. 235, and *Cassidy v. Henry*, 31 U.C.R. 345; but, so far as I can see, they have no bearing on the present appeal, and I fail to understand why they were cited to us.

The appeal should be allowed with costs throughout, and the order of Fisher, J., set aside. The claimant should be allowed to prove his claim, but so as not to compete with the creditors of the Art Silk Company on the assets of that business, nor should he rank as a separate creditor of Edward Walkeam before the creditors of the Art Silk Company are paid in full.

*Appeal allowed.*

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## [APPELLATE DIVISION.]

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CLARKE v. FIDELITY-PHOENIX FIRE INSURANCE CO. OF NEW  
YORK.

*Insurance (Fire)—“Other Insurance”—Statutory Conditions 5, 9—Insurance by Owner of Equity of Redemption in Land of Buildings thereon—Insurance by Mortgagee to Protect his Interest, without Knowledge of Owner—“Property”—Insurable Interest, of Person Joining in Mortgage as Mortgagor—Surety Entitled to Assignment of Mortgage on Payment thereof.*

The plaintiff, the owner of the equity of redemption in certain land, insured the buildings thereon with the defendants. W., the holder of a mortgage on the land, for the purpose of protecting his own interest as mortgagee, and without the concurrence or knowledge of the plaintiff, procured from another insurance company a policy covering the same buildings, indemnifying him to the extent of \$2,500 against loss on his mortgage:—

*Held*, that W.'s insurance was not “other insurance” within the meaning of statutory condition 9, sec. 94 of the Ontario Insurance Act.

The two insurances were distinct—two distinct persons were insured, by two distinct companies, concerning two distinct and differing proprietary interests, though in the same subject-matter.

Statutory conditions 5 and 9 should be construed as one.

The word “property” in condition 9 means the insurable interest, not the article which is liable to be destroyed, and the property cannot be the same unless the interests are the same.

Review of the authorities. *North British and Mercantile Insurance Co. v. London Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569, and *Morrow v. Lancashire Insurance Co.* (1898), 29 O.R. 377, specially referred to.

W.'s policy purported to insure C., the plaintiff's husband, who had at the time of the issue of the policy no title to the buildings, but who had joined with his wife in making the mortgage to W., being at the date of the mortgage a joint owner with his wife:—

*Held*, by RIDDELL, J.A., that C. had an insurable interest.

Review of the authorities. *Hanover Fire Insurance Co. v. Bohn* (1896), 48 Neb. 743, 25 Ins. L.J., 681, 67 N.W. Repr. 774, approved.

AN appeal by the defendants from the judgment of LOGIE, J., at the trial (4th June, 1925), in favour of the plaintiff for the recovery of \$8,806.13 in an action upon two policies of fire insurance issued by the defendants. A policy of fire insurance had been issued by another insurance company in favour of one Wilson, the then holder of a third mortgage on the property insured by the defendants, and the question raised by the appeal was whether that policy was “other insurance” within the meaning of statutory condition 9 of the Ontario Insurance Act.

October 29. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

W. N. Tilley, K.C., for the appellants, after stating the facts, argued that the policy taken out by Wilson was "other insurance" within the meaning of condition 9, sec. 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183, and consequently the appellants could call for "pro rating." Conditions 9 and 5 are worded differently. Where the Legislature intends that the policy shall be put on by the "assured" it says so, as in condition 5, but this is not so specified in condition 9. The husband of the plaintiff had an insurable interest in the property by reason of his covenant contained in the mortgage.

*Ziba Gallagher*, for the plaintiff, respondent, contended that the two conditions should be read together, and when so read the policy in question was not "other insurance," because the persons insured were different and the interests in the property were different. The husband had not an insurable interest in the property.

December 2. MASTEN, J.A.:—I would determine this appeal in favour of the respondent, on the ground that the contract of insurance bearing No. 218381, issued by the Employers Liability Insurance Company Limited, of London, England, for the sum of \$2,500, is not "other insurance" within the meaning of condition 9 of sec. 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183.

According to the evidence, that policy was procured by one Wilson, the then holder of a third mortgage on the property in question, for the purpose of protecting his own interest as mortgagee, and it was taken out without the concurrence or knowledge of the plaintiff, the owner of the equity of redemption. The policy was not taken out on behalf of the plaintiff, and she can make no claim under it.

The contract of insurance is a personal contract of indemnity. By the policies sued on the defendants covenanted with the plaintiff to indemnify her against loss by fire of her buildings. The other company contracted with Wilson, the third mortgagee, in consideration of a premium paid by Wilson, to indemnify him to the extent of \$2,500 against loss on his mortgage. That was a contract to which the plaintiff was neither party nor privy. It was not an indemnity of the plaintiff. Under no circumstances could she gain any advantage from that insurance, because the insurance company, on payment of the loss on the Wilson policy,

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would be entitled to be subrogated to the position of the mortgagee. The plaintiff, as owner, was indemnified against destruction of her property by fire. Wilson was indemnified by another company against loss on his mortgage to the extent to which the property pledged to him for his advances was injured, but not exceeding \$2,500. The two insurances are essentially distinct. I note the following differences: (a) two distinct persons are insured; (b) by two distinct companies; (c) concerning two distinct and differing proprietary interests, though in the same subject-matter. The interest of the plaintiff in the building insured is that of owner in possession entitled to the use and enjoyment of the property. The interest of the mortgagee in the building insured is as holder of a security to indemnify him against any loss on his loan.

Whether such a policy as that in question constitutes "other insurance" must depend on the construction and effect of conditions 9 and 5, sec. 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183, which, so far as relevant to the present question, are as follows:—

"9. In the event of there being any other insurance on property herein described at the time of the happening of any loss or damage in respect thereof, then this company shall be liable only for the payment of a ratable proportion of such loss or damage or of such amount as the assured shall be entitled to recover as provided by condition No. 5."

"5. If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of sixty per cent. of the loss or damage in respect of such property . . . ."

For the purpose of determining the true meaning of these two conditions they are, I think, to be construed as one. It may be noted in passing that in the revision of the Insurance Act, 1924, 14 Geo. V. ch. 50, sec. 92, they are consolidated as condition 8. Reading then the two conditions together, it is manifest from the opening words of condition 5 that they apply only when the assured (that is the plaintiff in this case) is the holder of other insurance and have no application where the other insurance is held by some person other than the plaintiff. Not only so, but the decided cases establish that there can be no co-insurance, in the technical meaning of that term, and no contribution

among several insurers, where the proprietary interests insured are different.

Condition 9 derives its origin from No. 9 of the statutory conditions scheduled to ch. 24 of the Ontario statutes of 1875, 38 Vict., and that statute was enacted on the recommendation of a special commission appointed to consider the question. But long before that statute was passed in 1875, clauses making similar provisions had been customarily inserted in the fire insurance policies of many companies, and the principle of contribution between co-insurers had been established in the Courts. Our statute did no more than adopt in statutory form the insurance practice and the principles of equity which had already been established—I refer to three cases which illustrate the application of such practice and such principles.

I refer in the first place to *North British and Mercantile Insurance Co. v. London Liverpool and Globe Insurance Co.* (1877), 5 Ch.D. 569. In that case Barnett & Co. were wharfingers, and as such had effected insurance on certain grain stored with them by customers. The merchants owning the grain had also effected insurance on the same grain, and a question arose between the insurers of Barnett & Co. and the insurers of these merchants as to whether Barnett's insurers were entitled to contribution from the insurers of the merchants. The policy contained a condition that "if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, the company shall not be liable to pay or contribute more than its ratable proportion of such loss or damage." The case was first heard before Sir George Jessel, Master of the Rolls, who determined that there was no right to contribution. His decision was appealed to the Court of Appeal, and was argued on one side by Fry, Q.C., and Cohen, Q.C., and on the other by Matthews, Q.C., and Davey, Q.C. The latter in presenting their case argued that the 9th condition contained in the policy (which is substantially the same as the 9th condition quoted above) was aimed against double insurance or over-insurance, that it was only applicable to cases in which there would have been contribution between the companies in equity, and was intended in such cases to prevent circuity of action by limiting the original liability of the companies, instead of driving them to seek contribution against each other; that the words "by any other person" refer, not to a stranger, but to an agent; and that the provision applied only where the two insurances were

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made by or on behalf of the same person and of the same interest.

Lord Justice James, in the course of his judgment, says:—  
“The case is this: Barnett, being liable to make good any loss by fire of the goods to Rodocanachi, insured the goods in one office, and Rodocanachi, for his own protection, insured the goods in another office. There was no communication between the two offices or between the two persons insuring. Under these circumstances, it seems to me utterly impossible to say that there could have been any contribution. Contribution exists where the thing is done by the same person against the same loss, and to prevent a man first of all from recovering more than the whole loss, or if he recovers the whole loss from one which he could have recovered from the other, then to make the parties contribute ratably. But that only applies where there is the same person insuring the same interest with more than one office.”

That case was followed by the case of *Scottish Amicable Heritable Securities Association v. Northern Assurance Co.* (1883), 11 Ct. of Sess. Cas. (4th ser.) 287. In that case there were two sets of policies effected, four in the names of first mortgagees and the mortgagor, and three in the names of second mortgagees and the mortgagor, and all at the cost of the latter, who was expressed to insure in respect of his reversion, that is, the value that would remain over after indemnification of the creditors. The question was, whether the first mortgagees could recover the full amount of the loss under their policies, which were sufficient to pay it, or were bound to submit to a ratable reduction by reason of the existence of the second mortgagees' policies, and it was held that they were not so bound but could recover according to their claim. In that case the policies were taken out in the name of the loan company *primo loco*, and the proprietors in reversion, and in each policy there was a contribution clause to the effect that if at the time of any loss by fire occurring to any property thereby insured there should be any other subsisting insurance, “whether effected by the insured or by any other person covering the same property,” the insuring company should only be liable to contribute its ratable proportion of the loss. The claim of contribution was denied.

Another action, *Glasgow Provident Investment Society v. Westminster Fire Insurance Co.* (1887), 24 Scottish L.R. 691, and in appeal *Westminster Fire Office v. Glasgow Provident Investment Society* (1888), 13 App. Cas. 699, was brought on the other three policies by the second mortgagees, and the question of

contribution was again raised. This action was decided in favour of the pursuers before the Lord Ordinary, and that decision was affirmed by the Court of Session and ultimately by the House of Lords. The reasons are stated somewhat fully in Bunyon on Fire Insurance, 7th ed., p. 286 and following pages.

In 1898 the point came up for consideration before the late Chancellor Boyd in the case of *Morrow v. Lancashire Insurance Co.* (1898), 29 O.R. 377. In that case the mortgagor held an insurance on his barn with the defendant company for \$2,100. Having mortgaged his farm, including the barn, the mortgagees, pursuant to the provisions of the mortgage, but without the knowledge or consent of the mortgagor, insured the barn for \$600. *Held*, that the insurance effected by the mortgagees could not be deemed to be a subsequent insurance within the meaning of subsec. 8 of sec. 168 of R.S.O. 1897, ch. 203, nor could it be deemed a double insurance. At p. 381, the Chancellor says: "I cannot regard this as a case of 'double insurance,' as understood in commercial law" (referring to the *North British* case above mentioned). "The plaintiff's interest in the policy he effected is not to be defeated by the wholly unauthorised act of a stranger effecting a second insurance in his name without his knowledge: see *per* Hagarty, J., in *Dafoe v. Johnstown District Mutual Insurance Co.* (1857), 7 U.C.C.P. 55, 59; and *Gilchrist v. Gore District Mutual Fire Insurance Co.* (1873), 34 U.C.R. 15."

For the purposes of this appeal no difference appears to exist between condition 9 and the conditions which were under consideration in the three cases to which I have referred. Hence I am led to the conclusion that, both on the true construction of the words of conditions 9 and 5 and on the principles established by the authorities mentioned, the Wilson policy is not "other insurance" within the meaning of the Insurance Act.

I would dismiss the appeal with costs.

LATCHFORD, C.J., and MIDDLETON, J.A., agreed with MASTEN, J.A.

RIDDELL, J.A.:—An appeal by the defendants from a judgment of Mr. Justice Logie in favour of the plaintiff upon a fire insurance policy.

The facts are as follows: A certain house in Toronto was once the property of the plaintiff, Mrs. Clarke; it then became the joint property of Mrs. Clarke and her husband; in that condition of the title, the owners made a mortgage which by assignment

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App. Div. became the property of one Wilson; then Mr. Clarke conveyed to  
 1925. his wife; she procured a policy, February, 1923, in the defendant  
 CLARKE company for \$4,000, and another, January, 1924; the mortgagee,  
 v. being concerned as to his security, asked the mortgagors to put on  
 FIDELITY- further insurance to protect him, as the insurance was insuffi-  
 PHENIX cient; they did not put it on, saying that there was enough in-  
 FIRE surance; and he put on insurance himself—"just simply to  
 INSURANCE protect my mortgage," as he says—this was in December, 1921,  
 Co. OF after the registration of the deed from Clarke to his wife.  
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The policy purported to insure "Robert Clarke, Esquire," who had at the time no title in the property itself.

The only question involved in this appeal is whether the defendant insurance company can take advantage of this policy and call for "pro rating" under statutory condition 9, introduced in 1912.

The first contention of the plaintiff is that her husband had no insurable interest.

It is of course trite law, going back two centuries, that the insured must have an insurable interest to support a fire insurance policy—*Lynch v. Dalzell* (1729), 5 Bro. P.C. 431; *Sadlers Co. v. Badcock* (1743), 2 Atk. 554; Bunyon on Fire Insurance, 7th ed. (1923), pp. 31, 32; Welford & Otter-Barry on Fire Insurance, 2nd ed., pp. 23, sqq.

Such interest need not be a proprietary right; it may be based upon a contract, etc.; but the insured must be in some relation to the property insured in consequence of which relation he may benefit by its safety or may be prejudiced by its loss. The famous case of *Lucena v. Craufurd* (1806), 2 B. & P. (N.R.) 269, contains all the principles for determining such relations.

In the present case, the husband and wife being mortgagors, on the conveyance by the husband to the wife there arose at once to the husband a right to indemnity by the wife against being called upon to pay the mortgage. All the law that it is necessary to consider is to be found in *Re Cozier, Parker v. Glover* (1877), 24 Gr. 537, and cases there cited. Does the assignor in such a case still retain an interest—an insurable interest—in the land, there being the personal obligation, an implied contract, on the part of the assignee to indemnify him?

It is, of course, true that if the property were destroyed by fire, the wife would or might be less able to pay the mortgage, and so the assignor be more likely to be compelled to pay; but that is true of goods, buildings, etc., owned by an assignee, with which the assignor has not any relation whatever.



The position of an assignor as such in such cases is not so strong as that of an ordinary creditor—the right of the former is simply an indemnity against being obliged to pay, the right of the latter is to be paid. An ordinary creditor without lien or charge has never been considered to have an insurable interest in his debtor's property—even though the destruction of that property might well prevent him realising his debt: *Wolff v. Horncastle* (1798), 1 B. & P. 316, at p. 323; *Moran Galloway & Co. v. Uzielli*, [1905] 2 K.B. 555, at p. 560; *cf. Seagrave v. Union Marine Insurance Co.* (1866), L.R. 1 C.P. 305; *Ebsworth v. Alliance Marine Insurance Co.* (1873), L.R. 8 C.P. 596, at p. 643.

It was argued that the husband had an insurable interest by reason of his covenant to insure contained in the mortgage.

It has been held that a covenant to insure gives an insurable interest: *Heckman v. Isaac* (1862), 6 L.T.R. 383; *Smith v. Provincial Insurance Co.* (1868), 18 U.C.C.P. 223, at p. 226—but this only if and so long as the obligation exists: *Curling v. Matthey* (1921), 37 Times L.R. 717.

The covenant to insure in the mortgage reads: “insure the buildings on the said lands to the amount of not less than the principal money hereby secured in dollars of lawful money of Canada. Provided that if and whenever such sum be greater than the insurable value of the buildings such insurance shall not be required to any greater extent than such insurable value, and if and whenever the same shall not be less than the insurable value of the mortgagee may require such insurance to the full insurable value. And (without prejudice to the foregoing statutory clause) it is further agreed that the mortgagee may require any insurance of the said buildings to be cancelled and a new insurance effected in an office to be named by him and also may of his own accord effect or maintain any insurance herein provided for and any amount paid by him therefor shall be forthwith payable to him with interest at the rate aforesaid by the mortgagor and shall be a charge upon the land.”

The mortgage is for \$2,500—the insurance was ample to cover this sum; and the only argument which could be adduced to support the policy on this ground must be based upon the clause, “Provided that if and whenever,” etc. Admittedly “such sum,” i.e., the principal sum secured by the mortgage (\$2,500), is not “greater than the insurable value of the buildings,” “the same” is less than such insurable value—consequently there was no covenant on the part of the mortgagors not performed when the new insurance was put on. It was argued that the word

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“not,” where it last occurs above, should be elided; but we cannot do that, the mortgagors not consenting and the mortgagee not being before the Court asking for the change.

I do not think it necessary to decide whether, as urged by Mr. Tilley, the husband had an insurable interest by reason of the covenant—because there are other considerations which make it, I think, manifest that he had.

The relation of husband, wife, and mortgagee comes under the second of the classes of suretyship made by Lord Selborne, L.C., in *Duncan Fox & Co. v. North and South Wales Bank* (1880), 6 App. Cas. 1, at pp. 10, 11, viz., those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, made by the principal and surety only, to which the creditor is a stranger—the man who has in fact made himself answerable for another's debt being *quoad* the creditor no surety but a principal.

Whatever may have been the rights of a surety at one time—at present he has, on paying off the whole of the mortgage indebtedness, the right to an assignment of the security: The Mercantile Law Amendment Act, R.S.O. 1914, ch. 133, sec. 3 (1), (2); *Ewart v. Latta* (1865), 4 Macq. H.L. 983; *Mayhew v. Crickett* (1818), 2 Swanst. 191; *Allen v. De Lisle* (1856), 3 Jur. N.S. 928; *Duncan Fox & Co. v. North and South Wales Bank*, 6 App. Cas. 1.

The fact that until the mortgage should be actually paid off by his wife he might be called upon to pay, is of importance. Whenever the mortgage became due he might pay it—and, paying it, would have the right to have the mortgage assigned to him.

I have found only one case on the precise point, *Hanover Fire Insurance Co. v. Bohn* (1896), 48 Neb. 743, 25 Ins. L.J. 681, 67 N.W. Repr. 774. W. and C. Bohn, owning real estate in common, mortgaged it for a debt owed by both; they insured against fire in certain companies, but before the renewal of the policies they had sold the property subject to the mortgage. The Court held that, notwithstanding that they had sold and conveyed the property subject to the mortgage, they still had an insurable interest. The cases of *Williams v. Roger Williams Insurance Co.* (1871), 107 Mass. 377, *Waring v. Loder* (1873), 53 N.Y. 581, *Lycoming Fire Insurance Co. v. Jackson* (1876), 83 Ill. 302, *Norwich Fire Insurance Co. v. Boomer* (1869), 52 Ill. 442, are quoted, but none of them is in point. I am not prepared,

without further consideration, to accept the very broad definition or description of "insurable interest" given in these cases. Nearer is the case of *Strong v. Manufacturers' Insurance Co.* (1830), 10 Pick. 40, in which the equity of redemption of a mortgagor was sold for (apparently) its full value, but yet the mortgagor was held by the Massachusetts Courts to have an "insurable interest." But the Nebraska decision is, I think, sound, and consequently it should be held that the husband had an insurable interest. I see no more reason why his interest should be uninsurable on the ground that it might never become in actual possession than that the inchoate interest of a tenant by the curtesy should be uninsurable for the same reason: *Caldwell v. Stadacona Fire and Life Insurance Co.* (1883), 11 Can. S.C.R. 212. (Some of the English text-writers, e.g., Porter, 7th ed., p. 294, and Bunyon, 7th ed., p. 372, have found in *Parsons v. Queen Insurance Co.* (1878), 29 U.C.C.P. 188, a decision as to the insurable interest of a mortgagor who has been foreclosed, which I fail to discover.)

Remains now the question as to the application of statutory condition 9, on the assumption that the mortgagee's insurance is valid.

This may be made to depend on the meaning of the word "property" in the condition—the word in a similar condition has been authoritatively decided to mean the insurable interest, not the article which is liable to be destroyed—and the property cannot be the same unless the interests are the same: *North British and Mercantile Insurance Co. v. London Liverpool and Globe Insurance Co.*, 5 Ch.D. 569 (C.A.)

This decision astonished the insurance companies in Britain, and "induced them to insert the word 'buildings' instead of . . . 'property' in their policies," says Cohen, Q.C., *arguendo*, in *Nichols and Co. v. Scottish Union and National Insurance Co.* (1885), 2 Times L.R. 190, at p. 191, but the decision has always been followed. In such a condition "contribution takes place where different insurers insure the same interest in respect of the same property and the same perils:" Porter, *Laws of Insurance*, 7th ed., p. 249. See *Kelly v. Liverpool and London and Globe Insurance Co.* (1871), 2 Hannay (13 N.B.) 266, where it was held that the other insurance must be effected for the benefit of the assured, or with his knowledge or consent.

There are other difficulties in the way of the defence, but the above is sufficient to justify us in dismissing the appeal with costs.

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Since the above was in manuscript I have read the judgment of my brother Masten, and I fully concur in his views.

I would dismiss the appeal with costs.

*Appeal dismissed.*

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[APPELLATE DIVISION.]

1925.

Dec. 2.

McKITTRICK v. BYERS.

*Negligence—Injury to Child by Motor Vehicle—Action by Child and Father—Findings of Jury—Negligence of Motorist—Contributory Negligence of Child—Application of Contributory Negligence Act, 1924, sec. 3—Accident Occurring between Date of Passing of Act and Date of Coming into Force—Action “hereafter Brought”—Cause of Action of Father.*

On the 17th April, 1924, the Contributory Negligence Act, 1924, 14 Geo. V. ch. 32, was given the royal assent; on the 23rd May, 1924, the infant plaintiff was run down and injured by a motor car of the defendant; on the 1st July, 1924, the Act came into force; and on the 27th September, 1924, this action was commenced by the infant and her father to recover damages for her injury. At the trial, the jury found negligence on the part of the defendant and contributory negligence of the infant, and assessed and apportioned the damages:—

*Held*, that, while sec. 3 of the Act directs the apportionment of the damages only in an action “hereinafter brought,” the cause of action must also be subsequent to the coming into force of the statute to bring the provisions of the statute to bear upon the action.

*Wood v. Riley* (1867), L.R. 3 C.P. 26, 27, applied and followed.

The statute not being applicable, the finding of contributory negligence prevented the infant from recovering.

The claim of the infant’s father was also defeated by her contributory negligence.

Review of the authorities.

*Knowlton v. Hydro-Electric Power Commission of Ontario* (1925), *ante* 80, approved.

THE following statement of the facts is taken from the judgment of RIDDELL, J.A.:—

An appeal by the defendant from the judgment entered for the plaintiff at the trial before WRIGHT, J., and a jury, at a Toronto sittings.

On the 23rd May, 1924, the infant plaintiff, a girl of nine years of age, when crossing Dundas street, in the city of Toronto,

was run down and injured by a motor car of the defendant: both she and her father sue.

The jury, after a proper charge, gave the following answers to the questions put:—

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1. Has the defendant satisfied you that the accident in question was not caused by the negligence or improper conduct of the driver of the automobile? A. No.

2. Was the driver of the automobile guilty of any negligence that caused the accident to the plaintiff Kathleen McKittrick? A. Yes.

3. If your answer to No. 2 is "Yes," then state in what such negligence consisted? A. Our judgment is that the driver did not have his car under proper control.

4. Could the plaintiff Kathleen McKittrick, by the exercise of reasonable care, have avoided the accident? A. Yes.

5. If your answer to No. 4 is "Yes," then state what Kathleen McKittrick did or omitted to do that constituted negligence or want of reasonable care on her part? A. Became confused and turned back from centre of road.

6. If your answers to Nos. 2 and 4 are "Yes," do you find it practicable to determine the respective degrees of fault on the part of the plaintiff Kathleen McKittrick and the driver of the automobile? A. Yes.

7. If so, then state the degree in which each of such parties was in fault and the manner in which the damages should be apportioned? A. The defendant 70 per cent.; the plaintiff 30 per cent.

8. At what amount do you assess the damages? A. (a) The plaintiff Kathleen McKittrick \$500; (b) to the plaintiff D. J. McKittrick \$200.

Upon these answers my learned brother Wright directed judgment to be entered for the infant for \$350 and for the father for \$140, with costs on the County Court scale without set-off.

The defendant appeals.

November 19. The appeal was heard by RIDDELL, MIDDLETON, and MASTEN, JJ.A., and GRANT, J.

W. A. McMaster, for the appellant, argued that the Contributory Negligence Act, 1924, 14 Geo. V. ch. 32,\* did not apply, be-

\*The Contributory Negligence Act, 1924, was assented to on the 17th April, 1924.

Sections 3 and 5 are as follows:—

3. In any action or counterclaim for damages hereafter brought,



App. Div. cause, though the action was brought after the coming into force  
 1925. of the statute, yet the tort upon which the action was based was  
 committed before that time. This being so, the contributory  
 McKITTRICK negligence of the infant prevented her from recovering damages:  
 v. *Upper Canada College v. Smith* (1920), 61 Can. S.C.R. 413;  
 BYERS. *Henshall v. Porter*, [1923] 2 K.B. 193. And the same contribu-  
 tory negligence would prevent the father from recovering.

*J. C. M. MacBeth*, for the plaintiffs, respondents, contended that the Contributory Negligence Act applied. The case came within the very words of the statute, being an "action . . . for damages hereafter brought." The Act was assented to on the 17th April, 1924, came into force on the 1st July, and the action was commenced on the 27th September. The Legislature is presumed to know what it is enacting. If the Legislature had meant the Act to cover cases of "damages hereafter sustained," it would have said so. The father should, in any event, recover, because the tort of the child and that of the defendant were independent wrongs, and the tort of the child did not prevent the father suing the defendant for his tort. On the question of the application of the statute, he referred to Craies on Statute Law, 3rd ed., p. 346.

December 2. The judgment of the Court was read by RIDDELL, J.A. (after stating the facts as above):—No fault can reasonably be found with the answers of the jury; and the attack is upon the judgment as based thereon, raising questions as to the general law as well as to the application of the Contributory Negligence Act, 1924, 14 Geo. V. ch. 32.

The dates are material:—

1924. April 17, the Act was assented to; May 23, the accident occurred; July 1, the Act came in force; September 27, teste of writ of summons.

Section 3 of the Act provides for peculiar findings, where

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which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury . . . shall find:—

First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.

5. This Act shall come into force on the 1st day of July, 1924.

contributory negligence is made to appear, "in any action or counterclaim for damages hereafter brought;" the plaintiffs argue that the Act being assented to in April, the word "hereafter" should be referred to that date—even though the Act did not come into force until the 1st July.

A very specious argument might be built upon analogy from the case of *Page v. Midland Railway Co.* (1893), 95 L.T.J. 252, affirmed as it is on that point by *Page v. Midland Railway Co.*, [1894] 1 Ch. 11. There the testatrix had bequeathed to her daughter "all sums of money which shall hereafter be paid by the . . . railway company in respect" of certain land. Although the will did not become effective until the death of the testatrix, the word "hereafter" was held to cover the payments made by the railway company after the execution of the will. By analogy, it might be argued that the same effect should be given to the words in a statute assented to but not to become effective until a future day. But that case also restricted the bequest to the payments made after the execution of the will and before death—an analogous interpretation of the word in the statute would be absurd.

There is nothing to take this Act out of the ordinary rule that, as "the thing settled is when the Act shall come into operation, therefore all the sections are to be considered as speaking from the date so fixed and are all governed by the last section:" *Wood v. Riley* (1867), L.R. 3 C.P. 26, at p. 27, *per* Bovill, C.J. In that case there was under consideration a statute "passed" on the 20th August, to come into operation "on the first day of January next after the passing thereof," which, by sec. 5, made certain provisions for "any action commenced after the passing of this Act." Notwithstanding the clear distinction made in the final clause between the passing of the Act and its coming into operation, the latter being necessarily subsequent to and different from the former, the Court held that sec. 5 did not come into force until the "first day of January next after the passing," and that an action begun on the 13th October did not come within it.

"Hereafter" we must hold to be the same as "after the passing of the Act" and to have reference to the day of the coming into force of the statute, the 1st July, 1924.

This, however, does not dispose of the defendant's objection—it is true, he says, that the action, being brought in September, comes within the very words of sec. 3 and is an "action . . . for

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App. Div. damages hereafter brought"—but the tort upon which the action  
 1925. is based was committed before the 1st July, if after the 17th  
 April, and consequently the case does not come within the statute.  
 McKITTRICK  
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Were the case one of first instance and unhampered by authority more or less in point and binding upon us, I should, on the modern rule of crediting the Legislature with knowing the meaning of its own words and using the proper words to express its intention, unhesitatingly hold that this action, coming within the exact words of the statute, should be considered as governed by it.

But there is "a settled, recognised, and beneficent rule of law that existing rights are not to be deemed to be destroyed by a statute unless there be express words or the plainest implication to that effect:" *per* McCardie, J., in *Henshall v. Porter*, [1923] 2 K.B. 193, at p. 197.

The whole question has been so thoroughly discussed in the Supreme Court of Canada in *Upper Canada College v. Smith*, 61 Can. S.C.R. 413, and the cases have been there so fully canvassed, that no good end can be met by a reconsideration of it.

I think we must hold that while the language of sec. 3 refers only to an action "hereafter" brought, the cause of action must also be subsequent to the coming into force of the statute to bring the provisions of the statute to bear upon the action.

This conclusion is sufficient to dispose of the appeal in respect of the infant, and as to her the appeal should be allowed with costs in this Court and below.

As to the father, the contention of the plaintiffs is that his child and the defendant each by an independent tort caused him damage; and the tort of the child does not prevent an action against the defendant for his tort.

The proposition is an ingenious and plausible one, but no authority was cited for it, and I can find none.

Such authorities as there are support the principle stated in Beach on Contributory Negligence, 3rd ed., p. 189, sec. 132: "In actions by a parent" (for injury to his child by negligence) "the child's contributory negligence will defeat the claim."

The cases in the American Courts seem to be uniform in that sense:—

In *Chicago and Great Eastern Railway Co. v. Harney* (1867), 28 Ind. 28, a minor was hired by his father to the railway company, and was injured by the negligence of the company—the

Court held that if the injury was caused by his own negligence along with that of the company, the father could not succeed: App. Div.  
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In *Kennard v. Burton* (1845), 25 Me. 39, an action by a father for injury to his infant daughter, the Court held that if she contributed to cause the injury by her want of ordinary care, the father could not recover. *McKITTRICK v. BYERS.*  
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In *Burke v. Broadway and Seventh Avenue R.R. Co.* (1857), 34 How. Pr. 239, 49 Barb. 529, an action by a father for injury to his infant son, the Court laid it down broadly at p. 249 of *Howard*: "The father can recover only under the same circumstances of providence as would be required if the action were on behalf of the boy"—and held the contributory negligence of the boy a bar to the action—Miller, J., who dissented in part, concurring in this statement of the law. (See the report in *Barbour*.)

*Gilligan v. New York and Harlem R.R. Co.* (1852), 1 E. D. Smith 453, is to the same effect.

English cases are not wholly wanting. First, as to the principle on which such damages can be claimed:—

In *Hall v. Hollander* (1825), 4 B. & C. 660, it is laid down that in a father's action for injury to his son by negligence the gist of the action is the loss of service to him by such injury, and if the child could not perform service the action failed. In other words, the child is for the purpose of such an action in the position of a servant.

In the case of a servant there can be no doubt. In *Chaplin v. Hawes* (1828), 3 C. & P. 554, a master sued for injury to a horse driven by his servant—the servant being as much to blame as the defendant, the Court held that the plaintiff could not recover.

*Pluckwell v. Wilson* (1832), 5 C. & P. 375, was a like case. The child is in the same position.

In *Williams v. Holland* (1833), 6 C. & P. 23, an action for injury to the plaintiff's son, it was held at *nisi prius* that if the injury was occasioned partly by the negligence of the defendant and partly by the negligence of the plaintiff's son, the verdict could not be for the plaintiff. A rule *nisi* was obtained to set aside the verdict, but only as to the form of action—the ruling as to contributory negligence apparently not being thought even arguable by Bompas, Serjt. See *S.C.* (1833), 10 Bing. 112.

It is true that in this case the son was acting as a servant of his father; but the law has not yet given the parent a right of



App. Div. action for injury to a child *quâ* child—and he must rely upon the  
1925. services his child can render him *quâ* servant: *Hall v. Hollander*,  
*ut supra*.

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I can find no case in which it was held that the father had a right of action notwithstanding the contributory negligence of the injured child.

The appeal should be allowed also in respect of the father with costs and the action dismissed with costs.

Since the above was written the case of *Knowlton v. Hydro-Electric Power Commission of Ontario* (1925), *ante* 80, has been reported, in which a similar point is considered and a similar conclusion arrived at.

*Appeal allowed.*

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[IN CHAMBERS.]

REX V. BANNITI.

1925.

Dec. 3.

*Criminal Law—Habeas Corpus—Affidavit of Prisoner—Practice—Order of Judge—Jurisdiction to Set aside—Ontario Temperance Act—Magistrate's Conviction—Appeal to County Court Judge—Dismissal as to Part of Sentence Awarding Imprisonment—Issue by Magistrate of Warrant of Commitment and Arrest thereunder before Expiry of 15 Days—Sec. 92(12) (b) of Act (11 Geo. V. ch. 73, sec. 6, 12 & 13 Geo. V. ch. 86, sec. 5)—Discharge of Prisoner without Prejudice to Re-arrest—Jurisdiction of Magistrate to Issue Warrant at Proper Time—Time already Served Allowed as Part of Imprisonment.*

The affidavit in support of the motion for an order for the issue of a writ of *habeas corpus* should be made by the prisoner himself; but the Judge hearing an application, made on the return of the writ, for the discharge of the prisoner, has no jurisdiction to set aside the order for the issue of the writ, upon the ground that the affidavit was made by the solicitor for the prisoner, and not by the prisoner, unless the material upon which the order was granted was misleading or the order was made improvidently.

The defendant was convicted by a police magistrate of an offence against the Ontario Temperance Act, and was sentenced to pay a fine and to be imprisoned for a month. The defendant appealed to a County Court Judge, who, on the 19th November, 1925, amended the conviction by reducing the fine, leaving the sentence of imprisonment standing. On the same day, the convicting magistrate issued a warrant of commitment, and the defendant was arrested and imprisoned thereunder:—

*Held*, that under sec. 92, subsec. 12(b), of the Act (11 Geo. V. ch. 73, sec. 6, and 12 & 13 Geo. V. ch. 86, sec. 5), the warrant should not have been issued until after the lapse of 15 days from the date of the Judge's order, and was therefore issued without authority, and the prisoner was entitled to his discharge.

But the magistrate had jurisdiction to issue a warrant at the proper time; and, there being a valid conviction, the prisoner's discharge would not prevent his re-arrest upon a proper warrant.

The time already spent by the prisoner in confinement should be reckoned as part of his month of imprisonment.

MOTION for the discharge of the defendant from custody in Welland gaol.

December 1. The motion was heard by WRIGHT, J., in Chambers.

*D. B. Coleman*, for the prisoner.

*F. P. Brennan*, for the Crown.

December 3. WRIGHT, J.:—The prisoner is in Welland gaol, and has obtained a writ of *habeas corpus* upon order of Mr. Justice

Wright, J. Kelly. This is a motion upon the return of such writ for his discharge from custody.

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Mr. Brennan, for the Crown, takes the preliminary objection that the order for the issue of the writ of *habeas corpus* should not have been made, as the affidavit in support thereof was made by the solicitor for the prisoner, and not by the prisoner himself, and there was nothing to shew that the prisoner was in such close confinement that it was impossible to secure an affidavit from him.

While it is quite true that this is the usual practice: see *Rex v. Graf* (1909), 19 O.L.R. 238, 246; *Rex v. Murrell* (1923), 25 O.W.N. 141; yet I do not think this objection can prevail, as I consider that I have no jurisdiction to set aside the order issued by another Judge of the Supreme Court, in the circumstances of this case. The material was before him, and it does not appear that the material was misleading in any respect, so it could not be said that the order was improvidently made. It might well be that the learned Judge considered that the facts deposed to were better known to the solicitor than to the prisoner himself.

The prisoner was convicted before the Police Magistrate at Welland on the 20th October, 1925, for breach of the Ontario Temperance Act and fined the sum of \$500, and in addition thereto was ordered to be confined in the common gaol for the period of one month. From this conviction the defendant took an appeal to the County Court Judge, who, on the 19th November, delivered judgment amending the conviction by reducing the fine to the sum of \$200, but did not disturb the conviction so far as it imposed imprisonment.

On the 19th November, 1925, the Police Magistrate at Welland, who was the convicting magistrate, issued a warrant of commitment, and the defendant was arrested thereunder and is now in the common gaol at Welland under the said warrant of commitment.

On behalf of the prisoner it is alleged that the imprisonment is illegal, in that, under the provisions of subsec. 12(b)\* of sec.

\* Section 92 of the original Act, 1916, 6 Geo. V. ch. 50, was repealed in 1921 by 11 Geo. V. ch. 73, sec. 6, and a new sec. 92 was substituted. That section was amended in 1922 by 12 & 13 Geo. V. ch. 86, sec. 5, by adding to subsec. 12 the following clause: "(b) The order of the Judge shall not take effect until fifteen days from the date thereof, provided, however, that if the release of a person from custody has been ordered, the Judge may, with the approval of the Crown Attorney, grant bail to the prisoner in such sum and with such surety or sureties as the Judge, with the approval of the Crown Attorney, may deem sufficient, and may take the recognizance of the accused accordingly, conditioned to await and abide by the decision of the Appellate Division to which an appeal may be taken as provided by section 95 of this Act."

92 of the Ontario Temperance Act, such warrant should not be issued until the lapse of 15 days from the date of the Judge's order, and that therefore the warrant of commitment was issued without authority and in contravention of the provisions of this section.

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It is also contended that the Police Magistrate had no authority to issue a warrant after an appeal had been taken from his decision, but that the warrant must be issued by the County Court Judge.

Dealing with the first contention, I think the defendant's contention must prevail. The inquiry upon the return of a writ of *habeas corpus* is to determine the rightfulness of the detention at the time of the return, upon which the Court delivers judgment. See *Rex v. Mitchell* (1911), 24 O.L.R. 324.

The warrant on its face shews that 15 days had not elapsed from the date of the order of the County Court Judge on the appeal, nor has that period yet elapsed, so that the warrant on its face shews that it was prematurely issued and does not afford any authority to the keeper of the common gaol of the County of Welland to detain the prisoner, and he is entitled to his discharge from custody under this warrant. As there is a valid conviction, his discharge should not prevent his being re-arrested upon a warrant properly issued.

As to the second point, I think the Police Magistrate has jurisdiction to issue a warrant of commitment at the proper time: see *Re Rex v. Sipes* (1925), 44 Can. Crim. Cas. 60, [1925] 3 D.L.R. 361.

In my opinion, sec. 756† of the Criminal Code applies in this case, and under it the warrant of commitment may be issued by the Justice who made the conviction.

There will be an order made for the discharge of the prisoner from custody, without prejudice in any way to his re-arrest on a proper warrant, and on the express condition that no action shall be brought by him against any person in connection with his arrest or imprisonment.

There will be no order as to costs.

The Crown should see that the time already spent by the prisoner in prison should be allowed him, as otherwise he would have to undergo greater punishment than if the proceedings had been regular.

† 756. If an appeal against a conviction . . . is decided in favour of the respondents, the Justice who made the conviction . . . , or any other Justice for the same territorial division, may issue the warrant of . . . commitment for execution of the same, as if no appeal had been brought.



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EMPEY v. THURSTON.

*Negligence—Motor Vehicle Standing in Highway Run into by another Vehicle—Rule of the Road—Highway Traffic Act, 1923, 13 & 14 Geo. V. ch. 48, sec. 36(4), (5), whether Applicable to Standing Vehicle—Violation of Act—Evidence—Proximate Cause of Injury—Liability of "Owner" under sec. 42—Rate of Speed—Sec. 25—Negligence of Owner of Standing Vehicle—Settlement with Driver of Offending Car—Effect of, in Action against Owner—Release.*

On a dark and foggy night in December, 1924, the plaintiff had unnecessarily stopped his motor vehicle on the right-hand side of a paved highway in the country, and it had so remained standing for 10 or 15 minutes before the motor vehicle of the defendant, driven by another person, going in the same direction that the plaintiff's car had been going, struck the rear right-hand side of the defendant's vehicle, causing some injury to each car. The driver of the defendant's vehicle did not see the plaintiff's vehicle until almost up to it; then, seeing, or believing that he saw, persons on the highway at the left of the stationary car, and, fearing injury to them, he turned his own vehicle into the ditch at the right-hand side of the road, and in doing so gave the plaintiff's vehicle a glancing blow. In this action, brought to recover damages for injury to the plaintiff's vehicle and person, the defendant admitted that he was the owner of the other vehicle within the meaning of the word "owner" in sec. 42 of the Highway Traffic Act, 1923:—

*Held*, that the liability created by sec. 42 is not an unlimited liability, but is only "for any violation" of the enactment; and that subsec. 5 of sec. 36, providing that a person travelling or being on a highway in charge of a motor vehicle overtaking another vehicle, shall turn out to the left so far as may be necessary to avoid collision with the vehicle so overtaken, does not apply where the vehicle "overtaken" is stationary.

That rule of the road and the rule prescribed by subsec. 4, that the person overtaken by a vehicle travelling at a greater speed shall turn out to the right, are rules of practical necessity, applying only to vehicles in motion.

And *held*, upon the evidence, that the driver of the defendant's vehicle was not guilty of any violation of the Act nor of any actionable negligence, as to speed (sec. 25) or otherwise; and that the negligence of the plaintiff himself in leaving his car standing upon the highway, without giving proper warning in due time to vehicles approaching from behind it, was the proximate cause of his injury.

The plaintiff obtained from the driver of the defendant's car an admission of his liability and an agreement to pay a certain sum for the damages which the plaintiff asserted that he had sustained:—

*Held*, that the admission and agreement were not evidence in this action, but might be used for the purpose of discrediting the witness who made them.

*Held*, also, that the settlement thus made did not operate as a release of the defendant from the liability imposed upon him by sec. 42.

ACTION for damages for injuries sustained by the plaintiff when his motor vehicle, while stationary at the side of a highway,

was run into by another motor vehicle owned by the defendants or one of them; and counterclaim by the defendant William R. Thurston for damages for injury to his vehicle, which was being driven by another person at the time of the accident.

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November 23. The action and counterclaim were tried by MEREDITH, C.J.C.P., without a jury, at Woodstock.

*W. T. McMullen*, K.C., for the plaintiff.

*E. W. M. Flock*, for the defendants.

December 3. MEREDITH, C.J.C.P.:—There is no allegation, or suggestion, that the defendants or either of them, in person or through any servant or agent, was in any way connected with the circumstances out of which this action arises: the plaintiff's claim against them is based entirely on the provisions of sec. 42\* of the Highway Traffic Act, 1923.

That legislation makes the "owner" of a motor vehicle responsible for any violation of that enactment unless at the time of such violation the motor vehicle was in the possession of some other person without the owner's consent; and makes that responsibility additional to that of the driver.

And the circumstances out of which the action arises are: a collision of motor vehicles upon a highway, one being owned by the plaintiff and the other being driven by one who was not the owner of it.

The first fact, therefore, which the plaintiff must prove is the ownership of the other vehicle, which for convenience I shall call the "Ford car"—it was a Ford "sedan."

And the evidence adduced in his behalf proved that the defendant Robert Thurston was not, but that the other defendant was, the owner, and that proof entitled the defendant Robert Thurston to a dismissal of the action against him at the close of the plaintiff's case; but it was not then dismissed.

Upon the evidence adduced by the defendants it was contended that the defendants were partners in trade and that the Ford car was owned by the firm; but, to the contrary, that evidence proved that there was no partnership, and that, if there had been, the defendant William R. Thurston was the sole owner of this car.

\* 42.—(1) The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation.

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The action must therefore be dismissed as to the defendant Robert Thurston, with costs.

The other defendant admits not only ownership but that he is an owner within the meaning of that word as used in the 42nd section of the Act; and therefore it becomes unnecessary to consider any question as to the meaning or extent of the word "owner" as used in it.

The next step is an understanding of the character and extent of the liability created by that section: which plainly is "for any violation" of the enactment, not an unlimited liability.

And the violation of the enactment relied upon for the plaintiff was a violation of the provisions of subsec. 5 of sec. 36, which are: that a person travelling or being on a highway in charge of a vehicle, overtaking another vehicle, shall turn out to the left so far as may be necessary to avoid a collision with the vehicle so overtaken—the preceding subsection (4) providing that the person so overtaken by a vehicle travelling at a greater speed shall turn out to the right and allow the vehicle to pass.

The circumstances of this case bearing on this question are these: on a dark and very foggy night about the middle of the month of December, 1924, the plaintiff had unnecessarily stopped his car on the right-hand side of a paved highway in the country, and it had so remained standing for 10 or 15 minutes before the collision which the plaintiff complains of happened.

The Ford car, going in the same direction as the plaintiff's car had been going, struck the rear right-hand side of the plaintiff's car, causing some but not great injury to each car.

The driver of the Ford car did not see the plaintiff's car until almost up to it; then, seeing, or believing that he saw, persons on the highway at the left of the stationary car, and, fearing injury to them, he turned his own car into the ditch on the right-hand side of the road, but was unable to do so without giving the plaintiff's car a glancing blow, which is the collision in question.

It seems to me that the enactment relied on by the plaintiff can, for more than one reason, have no application to such a case as this. It is no new law but is merely a re-enactment of one of the oldest and best known "rules of the road;" a rule which applies, and can apply only, to vehicles in motion, a rule of practical necessity; the vehicle in front moves to its right, its proper side of the road; a vehicle coming in the opposite direction keeps to its right, its proper side of the road, and the third vehicle, moving faster than the first mentioned, passes between them, on the left-hand side of each, if there be room for the three, otherwise the

more rapidly moving vehicle must wait before passing until the way is clear and safe so that it shall not interfere with the traffic in the opposite direction, which has the right of way on its own—right-hand—side of the road.

The words of the enactment make this plain: when a vehicle "is overtaken" by a vehicle "travelling at a greater speed," the person so overtaken "shall turn out" to the right.

Necessity rules in the case of a stationary object: if a vehicle be standing on the left-hand side of the road, the plaintiff's contention would compel the driver of the other vehicle to go into the ditch or over the fence to pass it on the left-hand side, though the right-hand side of the road were wide open to him and his proper side: if standing in the middle of the road, to pass on the left-hand side endangering himself and the traffic coming towards him, and usurping its rights, though his own side was wide open to him and the proper place for him to be. If standing on the right-hand side, the passing must be on the left, there is no other way. Nor can the subsection apply to a vehicle which, without fault or defect in the driver of the car behind, is invisible to him.

I should not have thought it necessary to say these things, which seem to me to be obvious, but for the insistent contention made on the plaintiff's behalf that this legislation applies to vehicles standing as well as vehicles going at a less speed overtaken by vehicles going at a greater speed, indeed to every case.

But, if it did, it is not applicable to this case, because the driver of the Ford car was not passing, or intending to pass, the plaintiff's car; that which he intended, and endeavoured, to do was to go into the ditch on his right-hand side, before reaching the plaintiff's car, rather than run the risk of running down human beings whom he saw, or thought he saw, on the highway to the left of the standing car. To pass on the right was impossible; he could have had no thought of passing on that side.

There was no violation of the enactment in this respect; and no liability of any one can be based upon it.

Then it was said for the plaintiff that, even if there were no violation of any of the provisions of the Act, there might be liability for negligence not covered by its provisions, which of course is so; but that liability would be only on the person guilty of the negligence, not upon one who is merely an owner whose liability is created by the 42nd section of the Act only.

But that does not end the matter, because there are other provisions of the Act which may cover the charge respecting the "rate

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of speed " of the Ford car, contained in the plaintiff's statement of claim.

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The 24th section of the Act provides that no motor vehicle shall be driven upon a highway outside of a city, town, or village at a greater rate of speed than 25 miles an hour.

The plaintiff and his brother, in their testimony, guessed that the speed of the Ford car must have been 35 or 40 miles an hour; but that was based only on the sound of the engine and the click of a broken or disconnected tyre-chain on the mudguard of the car; and so the little value that can be placed on estimations of speed in such a manner was more than lost when it was proved that there were two loose parts of one chain each striking the mudguard, so that the estimation based on one only must be reduced to one-half, that is  $17\frac{1}{2}$  to 20 miles an hour, well within the statute and quite in accord with the testimony of the driver of the car and his companion that their speed was from 15 to 20 miles an hour.

A witness for the plaintiff testified that a Ford sedan passed him, he driving a like car, and he guessed the speed of the car at 35 miles an hour when passing, but would not swear to the speed. Evidence of that character is not impressive: in order to pass, the passing driver must necessarily increase his speed, however slowly he may have been going before; and I was unfavourably impressed by the demeanour of this witness, from whom it was difficult, and sometimes impossible, to get an answer in cross-examination; and to see whom the plaintiff had gone over 20 miles when subpoenaing him a short time before the trial; and to whom, and his other witnesses, the plaintiff went immediately after giving his own evidence, though all the witnesses were excluded from the court-room, at his instance, at the beginning of the trial.

Then there is the distance the Ford car went after its driver became aware suddenly of the imminent danger. What happens in such an emergency, on a dark night in a heavy fog in the middle of December, may not be quite what any one not in such circumstances thinks it was or should have been. I find nothing in this to discredit the testimony of the driver or his companion as to what happened, as truly as they can tell, in those few fearful moments. If obliged to find just what did happen, my finding would be that the plaintiff's brother was quite near to the rear of the plaintiff's car when raising his arms in warning, and that the driver of the Ford car did all that could be done to prevent injury to others, even though that meant considerable risk of injury to

the car he was driving and to him and his companion who were in it.

I am unable to find any negligence in not seeing the red light at the rear of the plaintiff's car. There is no reason why the testimony of the driver of the Ford car and his companion, that the wind-shield of that car was open and that they were carefully looking through it and saw nothing till the plaintiff's brother waving his arms loomed up, should not be accepted. It was in their own interest that they should be, and they were, I have no doubt, truthful, as well as more than usually fair, in their testimony. The fog was very heavy; the light must have been greatly obscured and quite obliterated at a short distance.

I am unable to find the driver of the Ford car guilty of any kind of actionable negligence: much less of negligence such as is mentioned in sec. 25 of the Act in connection with recklessness and speed greater than 40 miles an hour, for which severe penalties are provided.

If I had found the driver of the Ford car guilty of any violation of any of the provisions of the Act, I should not have been able to give the plaintiff any relief in this action, for I cannot but find that no such violation should have been the proximate cause of his injury; but must find, as I do, that his own negligence was.

On such a night as I have mentioned, without any reason or excuse for it that I can imagine, he kept his Overland car, for 10 or 15 minutes, on the frequently travelled part of the pavement of a provincial highway, a serious and obvious source of danger to the traffic on its going in the same direction as he had been going and intended to go.

The unreasonable fears of his wife, and his own submission to them, were the sole cause. His car had "back-fired," as it is commonly called, two or three times. There was nothing very unusual in that, and no reason why he should not have gone to his own home, which was only a very few miles away. But he let such unreasonable fears, and his wife's unreasonable insistence, rule the situation. He stopped and waited until his brother, who was following in his own car, came, and then asked him to clean the carburetor of the offending car, as that only was the cause of the back-firing; the brother declined doing so because, as he said, it was work that would "dirty" his hands; and, instead, he proposed towing the plaintiff's car home, and then his car was put in position in front of the other and a towing rope was made fast to each, and all things seemed to be in readiness for the two cars to move on, when the on-coming of another car was heard. At some

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time during the 10 or 15 minutes, occupants got out of the plaintiff's car, and went to the brother's car, which was in front; and it is not improbable that all of them—six in number—were at some time out of the cars and on the pavement at the left-hand side of the stationary cars. None of them was called to prove whether or not the driver of the Ford was right in thinking he saw human beings on the highway who might be run down if he had passed on the left of the standing cars: I cannot but think, therefore, that they were there. The plaintiff and his brother, who was a witness, were not there, and their attention was directed to the on-coming car.

Stopping here for a moment, I find that the plaintiff was guilty of negligence, indeed of a great want of care for the convenience and rights of others and for their safety, in stopping and leaving his car upon the pavement as far as it was, so far, his brother testified, that a person could walk along the right-hand side of it without going off the pavement, for 10 or 15 minutes. His car was not "stalled"—as is the common expression—and if it had been it could have been moved by hand; it was not even in any way crippled; there was no reason, or excuse, for not having it as far over to the right as it could be safely placed, and that would be clear or almost clear of the pavement on the gravel part of the road, which was then frozen. That should not have caused a moment's labour; and must have prevented this accident, and, almost with certainty, any other.

Then there were six able-bodied persons in the plaintiff's and his brother's party, yet not one of them took, or was ordered or asked to take, the obvious precaution of going back a sufficient distance to have warned on-coming car-drivers of the double danger, to them and to this party.

More than ordinary precautions were obviously needed. The fog, it is common knowledge, is often deceiving as to sight and sound, as well as obscuring to the view to the point of obliteration, even at short distances, sometimes.

According to their testimony, the plaintiff and his brother were aware of the on-coming of the Ford car when it was half a mile away: what excuse can be offered for one of them or another or more of the party not going a sufficient distance towards it to make sure of warning the driver of it of his and their danger? Six of them in a place of great danger; and nothing done. One of the six was another brother of the plaintiff.

Having regard to all the circumstances, I find that the brother who did go to the rear of the plaintiff's car went only a very short

distance towards the on-coming car, a distance that was useless as a safeguard by warning. There was no reason or excuse, that I can imagine, for not going farther, and it may be that in doing that which he did he obscured any red light that might have penetrated the heavy fog, however short and dim that penetration may have been.

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This negligence, too, was a proximate cause of the plaintiff's injury; and the two together make him, to my mind, plainly "the author of his own injury;" indeed either of them does.

And there is yet to be mentioned the neglect of what should be a plain precaution: the horn of the plaintiff's car, or of his brother's or both, should have been sounded continuously when the presence of an on-coming car became known, and the more so if it were thought to be travelling at a great rate of speed.

The plaintiff obtained from the driver of the Ford car an admission of his liability and an agreement to pay, in instalments, \$200.57 for the damages which the plaintiff asserted that he, and his other brother, I think, had sustained through the accident; but nothing has yet been paid under it.

The admission and agreement are not evidence in this action, but may be used to discredit the driver as a witness for the defence in this action; and, even if they were evidence, they could be of no great weight, as the question of liability is one of fact and law which the driver was quite incompetent to determine, and one which is to be determined not upon any one's general admission but upon the actual facts of the case and the law to which they are applicable. If there had been an admission of any fact, such as that the Ford car had been driven at a speed of more than 25 miles an hour, it would be an entirely different thing.

Then the promise to pay for the injuries caused by the collision was first obtained under circumstances not creditable to the plaintiff and his brother, who must have appeared to be big able-bodied men in the prime of life. The driver and his companion were quite young and not at all formidable-looking; indeed are somewhat boyish in appearance and manner. And the plaintiff's party was one of six persons, three of them brothers and farming-men. The driver and his companion were well- and mild-mannered throughout; and acted reasonably, but as if overawed. The plaintiff and his brother were aggressive, overbearing, threatening, and abusive, without justification or excuse. The driver's companion was seized by one of them, and a constable was sent for to arrest them, without any kind of justification or excuse.

I was favourably impressed by the demeanour of the driver



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and his companion; but was not by that of the plaintiff and his brother, and three things added somewhat to my distrust of them: their conduct on the occasion of the accident; the plaintiff's instructions not to repair any parts of his car which had been injured, though repairable, but to put in new parts, and making no allowance for the advantage which he thus gained, when making up the amount of his damages, though the advantage was considerable: charging, as if paid, \$15 more than he had paid for the new parts; and going out of court and speaking to his witnesses immediately after giving evidence, though the witnesses on both sides had been excluded upon his request.

As I have already said, it is not in this case necessary to consider the meaning and effect of the 42nd section of the Act generally: whether, for instance, the position of driver and owner is that of joint wrongdoers: but it is necessary to consider whether the settlement made between the plaintiff and the driver as to liability and amount releases the owner from the liability imposed on him by that section of the Act; and I am of opinion that it does not; but it is not necessary to consider the question whether more than the amount agreed on could be recovered from either. If it could not be recovered from the driver, who agreed to pay, I do not see how it could be recovered from the owner. All liable are liable for the same amount in the case of several wrongdoers.

Upon the question of damages, if not fixed by the agreement, it may be advisable that, having heard, at great length, all the evidence, I should assess them; and that I do thus: for injury to the car \$100; and for personal injury \$100. Taking out of the \$200.57 the advantages of new for old; the \$15 that was not paid, but which is a deliberate overcharge; and taking out the charge for "optician" and the other charges which may be the subject of another action, the balance would be less than \$100.

As to the personal injuries, I accept the testimony of Dr. Shaw as the most accurate; and that acceptance is strengthened by three things: the appearance of the plaintiff, physically erect and seemingly as active physically and mentally as any of the witnesses; his statement at the time of the accident that he was not hurt, and his ability to domineer over the driver of the Ford car and his companion and abuse and threaten them; his fixing the amount of his damages a month after the accident at \$200.57, and not stinting them, but on the contrary adding to them amounts to which he knew he had no right; and never making any greater claim until after he was informed that a man of the financial standing of one of the defendants might be liable as owner.

The defendant William R. Thurston is entitled to recover on his counterclaim; but at the close of the trial he expressed his willingness to abandon that claim if the plaintiff failed in his.

The action must be dismissed with costs; and the counterclaim, upon the consent of the plaintiff therein, without costs.

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*Solicitors—Taxation of Bills of Costs—Disputed Retainer—Affidavit of Documents—Power of Taxing Officer to Direct Filing of—Rule 757—Proper Case Made for Affidavit.*

Upon taxation of bills of costs rendered by solicitors, where the retainer is disputed and the Taxing Officer is inquiring as to it, he has power, under Rule 757, to direct the solicitors not only to produce all documents in their custody, possession, or power, but to make and file an affidavit stating that the documents produced are all those in their custody, possession, or power.

*Re Ross* (1879-80), 8 P.R. 86, 5 A.R. 82, and *Williamson v. Town of Aylmer* (1887), 12 P.R. 129, followed.

*Held*, also, that in the circumstances of this case the request for such an affidavit was reasonable.

AN appeal by the Northern Life Assurance Company from a ruling of the Taxing Officer upon taxation of bills of costs rendered by the solicitors to the appellants.

December 2. The appeal was heard by WRIGHT, J., in the Weekly Court, Toronto.

G. H. Kilmer, K.C., for the appellants.

H. S. White, K.C., for the solicitors, respondents.

December 4. WRIGHT, J.:—This is an appeal from a ruling of the Taxing Officer at Toronto, and raises an interesting point of practice.

The solicitors' bill was referred to the Taxing Officer for taxation, and in the course of the taxation certain disputes arose as to whether or not the retainer by the Northern Life Assurance Company was binding upon the said company. By an interim report, dated the 20th April, 1925, the Taxing Officer ruled that the bills in question were properly taxable as against the company on a solicitor and client basis: in other words, that the retainer by the company covered the various charges included in such bills.

Wright, J. An appeal was taken from this ruling by the clients, and by the  
1925. order of Mr. Justice Rose, dated the 28th October, 1925, the  
RE matter was referred back to the Taxing Officer to take such further  
SOLICITORS. relevant evidence as might be tendered by either party upon the  
issue dealt with in the said interim report.

As already mentioned, the report covered the question of retainer. Upon proceeding with the taxation, the solicitors for the appellants desired to have an affidavit on production as to the documents in the possession of the solicitors whose bills were before the Taxing Officer for taxation, but this the Taxing Officer refused to order, upon two grounds, viz.: (1) that he had no jurisdiction to make the direction asked for; (2) that the case was not one in which such a direction was necessary or advisable.

I think the Taxing Officer erred in holding that he had no jurisdiction to order an affidavit on production to be filed by the solicitors. It will be observed that a taxation such as the one in the present instance was virtually a summary trial before the Taxing Officer, and he was empowered to determine the question of liability, and also the quantum.

In order to do this it was quite as necessary that full discovery and production should be made as in the case of an ordinary action. The provision of Rule 757 appears to have been overlooked. That rule provides that all taxing officers shall, for the purpose of any taxation, have power to direct production of books, documents, etc.

The Taxing Officer apparently considered that, while he had the power to direct the production, yet he had no power to require an affidavit from the solicitors to the effect that the documents mentioned were all those in their custody, possession, or power, in analogy to the ordinary affidavit on production provided for in Rule 348.

In this view, I think the Taxing Officer erred. Under the former Chancery Order No. 222 the Master was empowered to direct the production of such books, papers, and writings as he thought fit, and might determine what books, papers, and writings were to be produced, etc. In *Re Ross* (1879-80), 8 P.R. 86, 5 A.R. 82, it was held that under the provisions of that rule the Master should require an affidavit indentifying the books and documents as being all those in the possession of the parties relating to the questions before the Master. Chief Justice Moss, at p. 86, says: "For exempting them from the obligation to pledge their oath to the facts material to production, it appears to us that there was no reason,"

Chancery Order No. 222, already cited, is in effect the same as the present Rule 757, and I am of opinion that the Taxing Officer, under the present Rule, is clothed with full power and authority to direct an affidavit on production to be filed.

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Turning now to a consideration of the second ground for the Taxing Officer's refusal, I am of the opinion that a direction should have been given in the present case that an affidavit on production should be filed. In order to determine the question as to whether or not the retainer was valid or binding on the client, it was proper and necessary that all correspondence between the solicitors and the clients, or the parties to the action, should be produced. It would also be necessary when the various items in the bill came up for consideration that all the correspondence and documents should be produced so as to place before the Taxing Officer all the material that was necessary to determine the issues between the parties. While production might be more essential on the taxation of the bill after the preliminary question as to retainer was decided, yet it would appear that the documents might have a bearing on the latter question, and it would be inadvisable to have two affidavits on production in the one matter.

In all the circumstances, I think that the request by the appellants for such an affidavit was reasonable, and production should have been ordered by the Taxing Officer. I would, therefore, allow the appeal, and direct that an affidavit be required from the solicitors.

As the point is a comparatively new one, I do not think it is a case for costs.

Since writing the foregoing judgment, my attention has been called to the decision in *Williamson v. Town of Aylmer* (1887), 12 P.R. 129, which supports the judgment given by me in the present case, and is helpful in considering the powers of the Taxing Officer.

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[MEREDITH, C.J.C.P.]

SCOTT V. HAYCOCK AND NUTT.

1925.

Dec. 4.

*Sale of Goods—Farm-stock Sold by Auction—Agreement with Creditor as to Disposition of Proceeds—Intention to Pay all Creditors in Full—Bulk Sales Act, 1917, 7 Geo. V. ch. 33, sec. 7—Application to Farmers—Bills of Sale and Chattel Mortgage Act, sec. 8—Fraudulent Conveyances Act—Assignments and Preferences Act.*

The defendant H., a tenant farmer, being in debt, determined to "sell out" and give up farming. He owed the defendant N. about \$1,600, and other creditors about \$1,400. The plaintiff was a creditor for



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something under \$800. It was agreed between the defendants that N. should lend H. \$1,000 to enable H. to pay off his debts; that H. should proceed with the sale of his farm-stock and chattels; that N. should discount the sale-notes at 6 per cent., and should be paid out of the proceeds of the sale the \$1,600 and the \$1,000. When H. got the \$1,000, he paid the plaintiff \$400, and promised to pay the balance after the sale, and the plaintiff agreed to wait until that time for payment, but he was not told of the agreement between the defendants. Both defendants believed that H. would be able, out of the proceeds of the sale, to pay all his debts in full. The sale took place, but the proceeds were not sufficient to pay even the claim of N., who received and retained the whole proceeds, pursuant to the agreement:—

*Held*, in an action to set aside the transaction, that the sale actually held was not a "bulk sale" within the meaning of the Bulk Sales Act, 1917, sec. 7; and there was no sale by H. to N.

The question whether farmers are within the provisions of the Act was not open by reason of the decision in *Worthington v. Robbins and Cadigan* (1924), 56 O.L.R. 285.

*Semble*, if the action had been based upon the Fraudulent Conveyances Act and the Assignments and Preferences Act, it would have failed, because there was no such intent as those Acts require.

*Semble*, also, that, if there had been a sale to N., it would have been void under sec. 8 of the Bills of Sale and Chattel Mortgage Act.

ACTION by a creditor of the defendant Haycock to set aside a transaction between Haycock and his co-defendant, Nutt, whereby the latter received the proceeds of the sale of the farm-stock and chattels of the other; and for recovery of the amount due by Haycock to the plaintiff.

November 24. The action was tried by MEREDITH, C.J.C.P., without a jury, at Woodstock.

*F. L. Pearson*, for the plaintiff.

*J. C. Hegler*, K.C., and *R. N. Ball*, K.C., for the defendant Nutt.

The pleadings were noted closed as against the defendant Haycock upon failure to deliver a statement of claim, and that defendant was not represented at the trial.

December 4. MEREDITH, C.J.C.P.:—The plaintiff's claim against the defendant Nutt is based entirely upon the provisions of the Bulk Sales Act, 1917, 7 Geo. V. ch. 33\*, both in the writ

\* The following provisions of the Act are relevant:—

3. It shall be the duty of every person who shall bargain for, buy, or purchase any stock in bulk, for cash or on credit, before closing the purchase of the same and before paying the vendor any part of the purchase-price (save as hereinafter provided), or giving any promissory note or notes or any security for the said purchase-price, to demand and receive from such vendor, and it shall be the duty of each vendor of such goods to furnish a written statement verified by

and in the statement of claim; but I am unable to perceive how that enactment can be applicable to this case.

There was no sale by the defendant Haycock to his co-defendant. If there had been, it should have been "null and void" as against the plaintiff under sec. 8 of the Bills of Sale and Chattel Mortgage Act. There should be no need to depend on the Bulk Sales Act, 1917.

What really took place was this: the defendant Haycock, a farmer, was rather deeply in debt for a tenant farmer, such as he was, and had made up his mind to "sell out" and give up farming, as he had proved unable to make it pay; he was owing his co-defendant about \$1,600; and he was owing other creditors a considerable sum, which, upon the scanty evidence on the subject, I estimate at about \$1,400; the plaintiff being a creditor for something under \$800. The defendant Nutt's debt was to a considerable amount for farm-stock sold by him to his co-defendant, some of which the defendant Haycock still had.

It was agreed between the defendants that the defendant Nutt should lend to his co-defendant \$1,000 to enable the latter to pay off his debts other than that to the defendant Nutt; that the defendant Haycock should proceed with his intended sale; that his co-defendant should discount the sale-notes at 6 per cent., and should be paid out of the proceeds of the sale the \$1,600, and be repaid the \$1,000 due to him.

The agreement was put in writing, but the writing was destroyed when it had been carried out. The purport of it was proved as I have stated it.

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statutory declaration of the vendor . . . which statement is to contain the names and addresses of all the creditors of the said vendor, together with the amounts of the indebtedness or liability due and payable by said vendor to each of said creditors. . . .

4. Whenever any person shall bargain for or purchase any stock in bulk, for cash or on credit, and shall pay any part of the purchase-price or execute or deliver to the vendor or to his order, or to any person for his use, any promissory note or other document for or on account of the purchase-price of said goods, or any part thereof, without first having demanded and obtained from the vendor or from his agent, a statutory declaration purporting to be such as is provided for in the last preceding section, then such sale shall be deemed to be fraudulent and shall be void as against the creditors of the vendor, unless all the creditors of the vendor are paid in full out of the proceeds of such sale.

7. Any sale or transfer of stock, or part thereof, out of the usual course of business or trade of the vendor, or whenever substantially the entire stock of the vendor is sold or conveyed, or whenever an interest in the business or trade of the vendor is sold or conveyed, such sale, transfer or conveyance shall be deemed "a sale in bulk" within the meaning of this Act. . . .

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When the defendant Haycock got the \$1,000, he paid to the plaintiff \$400; and promised to pay the balance after his intended sale; and the plaintiff agreed to wait until that time for payment, but he was not told of the agreement between the defendants.

I can perceive no good reason why the testimony of the defendant Haycock, that he believed the sale would realise more than it did, and that he should be able to, and would, pay the plaintiff the balance due to him, and that all of his debts should then be paid in full, should not be accepted.

The proceeds fell about \$100 short of enough to pay the defendant Nutt; and he received and retains the whole of them under the agreement before mentioned.

The defendant Haycock is not able now to pay anything; and is not likely to be able to do so. The outstanding loss is that of the plaintiff; but the defendant Nutt seems likely to lose at least as much in the balance yet due to him and in losses on the discounted notes.

There was no sale or mortgage to the defendant Nutt. He took no property in or right to the goods. He took only a personal right against his co-defendant—whether that could be enforced by injunction or not, it did not bind, or purport to bind, the goods.

It was not contended, and could not well be, that the payment of the cash receipts of the sale to the defendant Nutt and the discounting of the promissory note receipts of it by him was a “bulk sale” of “stock” to that defendant.

The question whether farmers are within the provisions of the Bulk Sales Act, 1917, is not open to the parties here. There is a known decision upon it†, which has not been reversed. As a question of policy there are reasons for and reasons against including farmers. It is not now a question of reasons for and reasons against; it is what is the effect of the words of the enactment?

To make a sale there must be a buyer as well as a seller; and a sale by auction, or otherwise, to many purchasers in many lots, is not a bulk sale but is the very opposite of a bulk sale; nor does sec. 7 of the Act make the sale made by the defendant Haycock a statutory bulk sale: see *Schwartz v. King Realty and Investment Co.* (1919), 93 N.J.L. 111. If it did, it would make no difference; the sale was not to the defendant Nutt.

The plaintiff's claim therefore fails.

† *Worthington v. Robbins and Cadigan* (1924), 56 O.L.R. 285; see also *Allen v. Patterson* (1925), 57 O.L.R. 287.

And if it had also been based upon the Fraudulent Conveyances Act and the Assignments and Preferences Act, it should also fail because I am unable to find any such intent as the Acts require, even if there be a statutory presumption of such intent; but the action is not based in any way on either Act, and so I have not considered that question as fully as I might if it had been; though I must find that both defendants reasonably believed that the defendant Haycock was able to pay all his debts; and also find that all debts would have been paid if the proceeds of the sale had not fallen much short of what the defendants reasonably expected.

The action—that is, this branch of the action—must be dismissed with costs, which I fix at \$100.

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WEST V. HUGHES.

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Dec. 17.

*Covenant—Building Restrictions—Building Scheme—Benefit of Lots in Subdivided Area—Person Buying Lot with Notice of Predecessor's Covenant but not himself Covenanting—Evidence—Intention—Common Advantage of Purchasers—Enforcement of Covenant at Instance of other Purchasers of Lots—Variation of Restrictions—Covenant, Assignment of, by Original Vendor.*

The defendant, the purchaser of a building lot, one of 130 into which a large tract had been subdivided and laid out and sold according to a registered plan, did not himself covenant to observe the building restrictions contained in the deed of conveyance to his predecessors in title, but had notice of their covenant, and was *held* to be bound thereby, inasmuch as the existence of a building scheme in regard to the whole tract was established; and the covenant was also *held* to be enforceable at the instance of other persons to whom lots in the subdivision had been conveyed.

The restrictions were not merely matters of agreement between the company which laid out the tract and its vendees, imposed for the company's own benefit and protection, but were meant to be for the common advantage of the several purchasers—and that was well understood by them.

The question whether the benefit of the covenant has passed to a purchaser of part of the land of the covenantee is a question of intention, and the true intention is ascertained by applying the words of the deed to the surrounding circumstances.

The essentials of a building scheme defined by reference to authorities. The variation of the restrictions in regard to a few lots was quite consistent with the existence of a true building scheme.

The company could not, by an assignment to the plaintiffs of the benefit of the covenant of the defendant's predecessors in title, give the plaintiffs any right of action against the defendant.



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AN issue directed by an order of KELLY, J., to be tried at a sittings of the Supreme Court of Ontario for the trial of actions. See *Re Hughes* (1925), 28 O.W.N. 430.

The issue was tried by ROSE, J., without a jury, at Hamilton. *S. F. Washington*, K.C., for the plaintiffs.  
*C. G. Dynes*, for the defendant.

December 17. ROSE, J.:—This is an issue tried pursuant to leave given by Mr. Justice Kelly.

In 1912, Delta Park Limited, being the owner of a part of lot 5 in the 3rd concession of the township of Barton, and being about to offer it for sale in parcels suitable for building lots, caused a plan of subdivision to be prepared and registered. The boundaries of the subdivision, to which the name "Delta Park" was given, are, as shewn on the plan, on the west Eastmount avenue, on the north and east King street and Ottawa street, and on the south the lands of other owners. Two streets, Maple avenue and Cumberland avenue, are shewn extended across the subdivision from west to east; and two streets, Balmoral avenue and Grosvenor avenue, are laid out running north and south, parallel with the western and eastern boundaries, Eastmount avenue and Ottawa street. The whole of the land not occupied by the streets is divided into 130 lots, of which 11 have frontages on King street. Most of the lots are 40 feet wide, but there are a few of greater width, located where it would not have been practicable to make every lot 40 feet wide, and a few are narrower.

Lot No. 124, on the south side of Cumberland avenue, which is one of the wider lots, having a frontage of 55 feet 3 inches, was conveyed by Delta Park Limited to Lillie A. Porteous and Charles N. Evans in 1921, by a deed, executed by the grantees and duly registered, in which the grantees, for themselves, their heirs, executors, administrators and assigns, and with the expressed intent that the covenant should be binding on the person, persons, corporation or corporations who from time to time might be the owner or owners and occupier or occupiers of the lot, and should run with the land (that is, I take it, with the intent that the burden of the covenant should run with the land of the covenantors), covenanted, promised, and agreed with and to the grantor, its successors and assigns, to comply with certain restrictions set out in the deed—the giving of the covenant being stated to be one of the terms and conditions of the sale of the lot. The restrictions, in so far as they are material to the present case,

are: (1) that no more than one building shall be erected on the lot and that such building shall be of brick, stone, or cement materials, and of the cash value of not less than \$3,000, and that the north wall shall be neither more nor less than 15 feet from the southern limit of Cumberland avenue; (2) that the lot shall be used for residential purposes only; and (3) that no blacksmith shop, livery stable, laundry, or factory of any description shall be built or maintained on the lot.

The defendant negotiated with Mrs. Porteous and Mr. Evans for the sale of the lot to him, and took a conveyance after he had made an unsuccessful effort to persuade Delta Park Limited to grant a release from the covenant against the erection of more than one building on the lot. The deed of conveyance to him is dated the 22nd January, 1925, and contains neither a restrictive covenant nor a reference to the deed of 1921.

In April, 1925, the defendant moved before Mr. Justice Kelly in the Weekly Court for a declaration that lot 124 was not affected or bound by the covenants contained in the deed of 1921, or, in the alternative, for an order under sec. 2 of the Conveyancing and Law of Property Act, 1922 (12 & 13 Geo. V. ch. 53), modifying the restriction so as to permit of the erection of two dwelling houses on the lot. The motion was opposed by the owners of some of the others of the lots in Delta Park, and affidavits were filed in support of an allegation by these owners that the restrictions were imposed and the covenant in the deed of 1921 was exacted by Delta Park Limited pursuant to a building scheme. Mr. Justice Kelly was not satisfied that these affidavits established the opponents' case; and, as he thought that probably the erection of two houses on the lot would do no harm to the owners of neighbouring land, he made an order modifying the restriction as asked, but he directed that the order should not issue until those opposing the motion had had an opportunity of serving a notice asking for the trial of an issue to determine the question "whether there exists (and if so to what extent) a building scheme affecting and binding upon this and the surrounding lands prohibiting the erection of more than one house on the lot:" *Re Hughes* (1925), 28 O.W.N. 430. The plaintiffs gave the notice provided for by the order, and the issue was set down and came on for trial before me at Hamilton.

The issue as set out in the record is this: "The plaintiffs affirm and the defendant denies that there is a building scheme affecting and binding upon the lands of the defendant, namely, lot 124 in Delta Park survey in the city of Hamilton, and the surrounding

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lands, prohibiting the erection of more than one house on the defendant's said property, and that the plaintiffs are entitled to enforce the observance of the said building scheme by the defendant in building upon his said lands." Reading that issue with Mr. Justice Kelly's order, I take it that what I am called upon to determine is: Was the covenant in the deed of 1921 a mere personal covenant between the defendant's predecessors in title and Delta Park Limited, or can it be found from the terms of the covenant, or can it be inferred from surrounding circumstances, that the covenant was intended to operate for the benefit of lots in Delta Park theretofore conveyed or thereafter to be conveyed to other persons? and: Is the covenant enforceable, at the instance of some of those other persons, against the defendant, who, while not a party to it, acquired his land with notice of it? See *Formby v. Barker*, [1903] 2 Ch. 539, 551.

The directors of Delta Park Limited decided, as is sworn by Mr. Campbell, who was a member of the board, that restrictions similar to those contained in the deed of 1921 should be imposed on the sale of all the lots, except that in the case of lots fronting on King street, which is a business street, there should be no restriction against building shops; and such deeds as were produced from the registry office indicate that the policy adopted was adhered to. In the conveyances of lots fronting on any street but King street the restrictions are the same or practically the same as those contained in the deed of 1921 to Mrs. Porteous and Mr. Evans; in the conveyances of the King street lots there are modifications such as would be reasonable, regard being had to the nature of the street. Thus, in the deed of conveyance of lot No. 1, which is written on a printed form prepared by Delta Park Limited, the words requiring the building to be 15 feet from the street-line are struck out and the purchaser covenants to use the building for residential or store purposes only; in the conveyance of lot No. 93, which is a deep lot, the restrictions as to one building, residential purposes, and distance from the street are deleted; in the conveyance of lot No. 3, which is a large triangular lot, there are similar deletions; and in the conveyance of lot No. 54 there is no restriction to residential uses.

As the sales proceeded, and houses were erected by the purchasers, it became necessary in a few instances to depart from the original division of the lands into lots. King street does not intersect Eastmount avenue and Ottawa street at right angles, but forms an acute angle with Eastmount avenue and an obtuse angle with Ottawa street—the east side of Delta Park (Ottawa

street) being short and the west side (Eastmount avenue) being long. Thus the lots fronting on King street are more or less triangular. Two such lots are Nos. 91 and 92, which are just west of one of the new streets, Grosvenor avenue. A strip 40 feet wide was cut off the back parts of these lots and sold as a lot or "parcel" having a frontage partly on Grosvenor avenue and partly on King street; and then the remaining parts of the lots were conveyed to another purchaser who was not required to agree to build nothing but a residence. Lot No. 126 is a wide lot with a frontage of 72 feet 5 inches on Grosvenor avenue at the southern edge of the park. It was sold in two parcels, first the north 30 feet and then what remained, the usual covenants being exacted in respect of each parcel; and a resolution passed on the 30th March, 1922, indicates that the consent of the owners of other lots in the vicinity was obtained before permission was given to build on the part last sold. Lot No. 130 is a similar lot at the southern edge of the plan, fronting on Ottawa street. It also was sold in two parcels, with similar restrictions as to the use to be made of each parcel. These, I think, are the only instances in which it is shewn that the company on the sale of a parcel of land departed from the practice of insisting that there should not be more than one building on a lot shewn on the plan; and in each instance there were reasons, apparently sufficient, why there should be a re-division of the land. In each case the parcel sold was approximately of the same area as lot 101 or lot 102 or lot 103; and a restriction against erecting more than one building on the parcel was imposed.

Mrs. Hunneyford bought from T. Hanrahan two lots, Nos. 190 and 110, at the corner of Cumberland avenue and Ottawa street, each having a frontage of 50 feet on Ottawa street, which lots Mr. Hanrahan had bought from the company in 1912 and had had conveyed to him by deeds on the company's printed forms, in which he as purchaser covenanted to observe the restrictions. Mrs. Hunneyford built a bungalow which inadvertently was placed within 15 feet of one of the streets, and she also built two houses. The directors, with the approval of the neighbours, as the secretary of the company says, released the restrictions by deeds executed in October and December, 1922, so as to validate what was done. This is the only instance proved of a release or modification of the restrictions imposed at the time of the sale; and the secretary says that the directors have "lived up to the restrictions in every respect," and have refused to entertain applications for releases or modifications. The deeds

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do not contain any reservation to the company of a right to vary the restrictions in respect of unsold lots; and the attitude of the directors is set forth in a resolution passed in February, 1919, in these words: "That the Delta Park Co. Ltd. have not the power to make any change in the building restrictions and that if any buyer or owner of a lot or lots in the survey deviates from terms on which he bought or owns, he does so on his own responsibility."

It ought to be noted, because a point was made of it by counsel for the defendant, that the condition as to the value of the house to be erected by the purchaser of a lot is not the same in every case: sometimes, as in the case of the sale of lot No. 124, the purchaser covenants that he will not build a house costing less than \$3,000, whereas in other cases the minimum cost is to be \$3,500.

Upon the whole of the evidence, both as to what was done and as to what the directors decided upon as a policy to be adopted, there seems to me to be little doubt that the directors intended that the whole subdivision except the King street frontage should be developed as a residential district which should be made desirable to prospective purchasers by restrictions as to the character of the houses to be erected, and that the outstanding restrictions should be that there should be no more than one house on a lot and that each house should cost at least \$3,000. I think it was intended that the restrictions should benefit the purchasers; but I do not think it can be found as a fact that there was any consideration of the question which arises in this case as to whether one purchaser should have a right of action to enforce the covenant of another purchaser. That is a question that would hardly occur to persons unskilled in the law; and I think that, while there was the general intention that every purchaser should have the benefit of the covenant of every other purchaser, it cannot be said that there was a specific intention that the right of the purchasers to insist upon observance of the restrictions should be enforceable in any particular manner.

It is easier to ascertain the intention of the company in exacting the covenants from the purchasers than it is to ascertain whether the purchasers from the company intended to create reciprocal rights and obligations as amongst themselves. Mrs. West, who bought two lots, Nos. 32 and 33, on the north side of Cumberland avenue, from the company in 1922, says that the secretary told her that the whole survey except the King street frontage was restricted, the restrictions being "one house to one lot, no factories, and no frame houses;" and that she bought relying upon the re-

strictions and would not have bought if they had not existed—that she decided to buy because she liked the idea of large lots with open spaces between the houses. Her husband bought two other lots, Nos. 119 and 120, fronting on the south side of Cumberland avenue, from persons who had acquired them directly or indirectly from the company. He says he would not have bought them if he had not thought that the restrictive covenants protected him. He thought that the restrictions did not apply to the King street lots; he did not know whether they applied to the Ottawa street lots. William Smith, another of the plaintiffs, bought his lot, No. 31, Cumberland street, from Harry Wakeham, in 1919. The lot was not built upon at the time, and Wakeham told him, Mr. Smith, that there was a restriction against building more than one house on a lot. This, Smith says, was a great inducement to him to purchase. Bernard Shrive, the third plaintiff, bought lot No. 123, on the south side of Cumberland avenue, next to the defendant's lot, No. 124, from one Coleman in 1922. He says that Coleman informed him about the restrictions; and that he understood that the restrictions applied to all the lots except those fronting on King street, and that there could not be on any lot, whatever its size, more than one house, and that each house must cost at least \$3,000 to build. He says that the existence of the restrictions was one of the chief inducements to him to purchase. One sub-purchaser, H. Dunham, called by the defendant, says that when he bought his lot he understood that there was a restriction against building more than one house on a lot, but that he thought it applied to the whole of the survey; that he did not know that it did not apply to the King street lots. These owners and Mr. Campbell, a director, and Mr. Whitfield, the secretary-treasurer of the company, are the only witnesses who give any evidence as to the information that purchasers had as to whether the restrictions were applicable to all the lots in the park or only to the lots other than those fronting on King street; and it is upon their evidence, taken with such documents as were produced, that a conclusion must be reached as to the knowledge that the purchasers had of the directors' intentions, and as to the intentions of the various purchasers. Mr. Campbell says that the directors absolutely refused to accede to requests from buyers for the removal of the restrictions; that they thought that even if they had a legal right to consent they were morally bound to refuse; and Mr. Whitfield's evidence is to the same effect; but neither of these witnesses says anything positive about the beliefs or intentions of the various purchasers. The evidence, then, is not entirely satisfactory; but the impres-

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sion left on my mind is that there was general knowledge of the restrictions—that much is established by the fact that the purchasers from the company were required to execute the deeds—and that it was well known that the restriction as to the use of the buildings for residences only did not apply to the King street lots; and I think it is established that the restrictions were not merely matters of agreement between the company and its vendees, imposed for the company's own benefit and protection, but were meant by the company to be for the common advantage of the several purchasers; and I think it is a fair inference from all the evidence that the purchasers (including the original purchasers of lot No. 124) understood that the restrictions were intended to be for the common advantage of all the purchasers: see *Nottingham Patent Brick and Tile Co. v. Butler* (1885-86), 15 Q.B.D. 261, 16 Q.B.D. 778—*per Wills, J.*, 15 Q.B.D. at pp. 268 and 269.

The circumstances in which, and the reason why, the Courts, at the instance of a covenantee, will restrain a person from using land in a manner inconsistent with a covenant entered into by his predecessor in title, of which covenant the purchaser had notice at the time of his purchase, have been discussed in *Formby v. Barker*, [1903] 2 Ch. 539, *London County Council v. Allen*, [1914] 3 K.B. 642, and *Chambers v. Randall*, [1923] 1 Ch. 149, and in cases in the Ontario Courts of which *Re Bowes Co. Ltd. and Rankin* (1924), 55 O.L.R. 601, may be cited; and there is no necessity to go again into the questions decided in those cases. Here, however, the question is not whether the defendant can be restrained at the instance of the Delta Park Company, but whether he can be restrained at the instance of purchasers of lots in Delta Park. That last is what I understand to be the meaning of the question raised by the issue: were the circumstances in which the defendant's predecessors in title entered into the covenant sought to be enforced such as to confer upon the plaintiffs, as owners of lots in Delta Park, the right to come to the Court to restrain the defendant from using his land in a manner inconsistent with the covenant given by his predecessors in title of which he had notice at the time of his purchase?

In such a case as this there is no question that the covenant is binding upon a purchaser who acquired the land of the covenantor with notice of the covenant; but there is always a question as to whether the benefit of the covenant has passed to a purchaser of part of the land of the covenantee, and that question is always a question of intention—the true intention being ascertained, as is stated by Farwell, J., in *Rogers v. Hosegood*, [1900]



2 Ch. 388, 397, by applying the words of the deed to the surrounding circumstances. If the true intent, so ascertained, was that the benefit of the covenant should pass to the purchasers of portions of the land of the covenantee, the Court, at the instance of the purchasers or some or one of them, in a proper case, will compel the covenantor's successor in interest to observe the restrictions. Where there is a true building scheme the intent that the benefit of the covenant shall pass to purchasers of portions of the land of the covenantee exists; if there was no such intent there is no true building scheme. The covenant is enforced because, the benefit of it having been annexed to one plot of land and the burden to another, the benefit and the burden pass to the respective assignees, subject, in the case of the burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant: *Rogers v. Hosegood*, per Collins, L.J., at p. 406.

The question being in each case a question of intention, it is important to consider some of the circumstances that have been treated in the cases as indicating that the intention was or was not that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others. One circumstance to which—as is stated by Lord Esher, M.R., in *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q.B.D. 778, 785—great importance attaches is that the vendor, having put up the whole of a property for sale subject to certain restrictive covenants, reserves no part for himself. That circumstance, in the absence of something contradictory, was in Lord Esher's opinion quite conclusive that the covenants taken from the purchasers were intended for the benefit of each purchaser as against the others. On the other hand, if the vendor retains a number of plots for himself, the existence of the intention that the rights and obligations should be reciprocal cannot be found unless it is made to appear that the vendor intended, as owner of the reserved lots, to be bound by covenants similar to those exacted from purchasers: *Osborne v. Bradley*, [1903] 2 Ch. 446; and it is rarely that such an intention on the part of the vendor can appear when he does not enter into the covenant himself. Another circumstance to be considered is whether upon the successive sales the vendor retains an express power to waive or vary the covenants with regard to unsold lots: *Osborne v. Bradley*.

The essentials of a building scheme are set forth with great clearness in *Elliston v. Reacher*, [1908] 2 Ch. 374 and 665; and the same case contains most important statements as to the evidence from which the intention of the vendor, and the footing upon which the several purchasers entered into their covenants,

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Rose, J. may be discovered. The case differs in its facts from the present case, inasmuch as there was (in writing upon the plan of the estate to be sold and otherwise) the clearest manifestation that Cozens-Hardy, M.R., had ever seen of an original intention on the part of the vendors to have a building scheme, which manifestation of intention was not displaced by the fact that the vendors had reserved a right to deal with any part of the estate not disposed of without reference to the conditions (pp. 670, 671); but the statement by Parker, J. (p. 384), of the essentials of a building scheme, and of the evidence from which the existence of the two essentials above mentioned may be deduced, is of general application. The statement of the essentials of a building scheme is as follows:—

“It must be proved (1.) that both the plaintiffs and defendants derive title under a common vendor; (2.) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3.) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.”

And the statement as to the mode of proving that the restrictions were intended to be for the benefit of all the lots intended to be sold, and that the respective purchasers purchased on the footing that the restrictions upon which they bought were to enure for the benefit of the other lots, is this:—

“The vendor’s object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which

might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material parts of those facts, it would be difficult, if not impossible, to establish the fourth point" (pp. 384, 385).

In *Reid v. Bickerstaff*, [1909] 2 Ch. 305, the fact, stated by Parker, J., in *Elliston v. Reacher*, that the vendor's estate or a defined portion thereof must be laid out for sale, was accentuated. Cozens-Hardy, M.R., said (p. 319):—

"There must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. These obligations need not be identical. For example, there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes various covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area."

And Buckley, L.J., said (p. 323):—

"There can be no building scheme unless two conditions are satisfied, namely, first, that defined lands constituting the estate to which the scheme relates shall be identified, and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his respective covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate with the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them."

In *Kelly v. Barrett*, [1924] 2 Ch. 379, in which the Court held that the facts, which need not here be stated, did not establish the existence of a scheme, Pollock, M.R., repeats that in order to prove the existence of a scheme it is not necessary to find any express contract by the vendor or the several purchasers—that it may be collected or inferred from the nature of the transaction—and he and Warrington, L.J., adopt the statement of Parker, J., in *Elliston v. Reacher* with the addition made in *Reid v. Bickerstaff*, as to the essentials of a scheme; and in the judgment of

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Sargant, L.J., there are remarks which draw attention to the danger of holding that there is a building scheme where in fact there is only another arrangement which has resulted in there being a number of purchasers, each of whom is subject to the same obligations towards the original freeholder, but who are not subject, and have never been intended to be subject, to any additional mutual obligations *inter se*. The Master of the Rolls also repeats the warning given by Lord Macnaghten in *Spicer v. Martin* (1888), 14 App. Cas. 12, against extending the principle upon which there is enforced against a man an obligation into which he has not entered "either in fact or with the person who is seeking to enforce it against him."

Of the cases in the Courts of Ontario, *Re Lorne Parke* (1913-14), 30 O.L.R. 289, 33 O.L.R. 51, may be cited as one in which the scheme was established; but it cannot be said that, regard being had to the documents referred to by Middleton, J. (30 O.L.R. 291-293), there is such similarity between the cases as to make the *Lorne Park* case very helpful to the plaintiffs in the present case. On the other hand, *Re Peters and Waddington* (1920), 18 O.W.N. 115, in which Kelly, J., held that the materials completely failed to establish the requisites of a building scheme, does resemble the present case in that the owner of land had subdivided it into 17 lots, had registered a plan of the subdivision, had sold all the lots, and from each purchaser had exacted a covenant to observe certain restrictions with regard to the property conveyed to him. The difference between the two cases is that in *Re Peters and Waddington* there seems to have been nothing to indicate that any purchaser knew anything about the terms upon which any other purchaser had acquired or was acquiring his parcel—there was no evidence of any statement by the vendor to any purchaser that there were restrictions applicable to the whole subdivision.

*Re Keyser and Daniel J. McA'Nulty Realty Co. Ltd.* (1923), 55 O.L.R. 136, is a case in which Middleton, J., found, upon affidavit evidence given upon a motion made under Rule 603, that a building scheme existed; but there was a division of opinion in the Divisional Court as to whether the finding was correct, and the order of Middleton, J., was upheld without prejudice to any action which might be brought for a declaration that no scheme existed of which the covenant in question was an essential element. Ferguson, J.A., in whose judgment Magee, J.A., concurred, inclined to the opinion that the affidavit evidence pointed to no more than one of those cases referred to by Sargant, J., in *Northbourne (Lord) v. Johnston & Son*, [1922] 2 Ch. 309, in which the vendor imposes covenants the benefits of which will not be attached to any particular



parcel of land but will be enforceable by the vendor for the general benefit of the unsold estate for the time being. Hodgins, J.A., on the contrary, was prepared to infer the existence of the scheme from the facts disclosed, which facts, or such of them as are stated in the report, seem to me to be weaker than the facts of the present case. However, the report does not state the evidence so fully as to enable one to form a clear opinion as to what any member of the Court would have thought ought to be held to be the proper finding upon the evidence adduced in the present case.

In my opinion, the existence of the building scheme is established in the present case, and the plaintiffs are entitled to enforce the covenant given by the defendant's predecessors in title. The parties derive title under a common vendor; previously to selling the lands to which the plaintiffs and the defendant respectively are entitled the vendor laid out the estate, Delta Park, for sale in lots subject to restrictions intended to be imposed on all the lots, and laid out a definite part of that estate (viz., all but the portion abutting on King street) for sale in lots subject to restrictions which in the particular that is of importance in this case are identical, and these restrictions are consistent and consistent only with a general scheme of development; and the restrictions were intended by the vendor to be and were for the benefit of all the lots intended to be sold. This much appears to me to be proved quite definitely. Further, I think that both the plaintiffs and the defendant or their predecessors in title purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme. As regards the only plaintiff who bought directly from the company I think that this fact is established clearly by the evidence; and as regards the defendant's predecessors in title I think it is an easy inference. There can be little doubt, it appears to me, that all the purchasers from Delta Park Limited had notice that the company had laid out the park for sale in lots subject to restrictions intended to be imposed on all the lots, which restrictions were consistent only with a general scheme of development; and, even if some of the purchasers had no specific information as to there being no requirement that the King street buildings should be used for residences only, the variation of the restrictions in the case of these few lots, which front on a business street, is one of those variations in detail which are to be expected and which, as I read the judgments of Parker, J., in *Elliston v. Reacher*, and Cozens-Hardy, M.R., in *Reid v. Bickerstaff*, are quite consistent with the existence of a true building scheme. The pur-

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chasers from the company, having notice that the company had laid out the park for sale in lots subject to restrictions of the kind mentioned, and having notice of the facts which lead to the conclusion that the company's intention was that the restrictions should be for the benefit of all the lots intended to be sold—that is to say, having knowledge of the first three of the points that have to be established—the fourth point (that is, that each purchaser purchased his lot upon the footing that the restrictions to which he agreed should enure for the benefit of the other lots) is readily to be inferred—indeed, in my opinion, it is a necessary inference.

My finding is that the building scheme set up by the plaintiffs is established, and that the plaintiffs are entitled to enforce the observance of it by the defendant in building upon his land, lot No. 124.

It may be mentioned, although, in my opinion, nothing turns upon it, that by a deed dated the 19th January, 1925, and duly registered, Delta Park Limited assigned the benefit of the several purchasers' covenants to Mrs. West and to each and every other person who on the day of the date of the deed was the owner of a lot in Delta Park. At the time of the execution of this deed, the company had made agreements for the sale of all of the lots, but some of the lots had not been paid for or conveyed, and probably, as the legal owner of those lots not conveyed, the company was in a position to enforce the covenant of the defendant's predecessors in title; but, in my opinion, the company could not, by an assignment of the benefit of the covenant, give the plaintiffs any right of action against the defendant. Whatever might have been the case if the defendant had been the covenantor, the fact is that the covenant purported to be assigned is not a covenant by the defendant. If a use of the land inconsistent with the covenant is to be enjoined at the suit of the plaintiffs, that will be because the defendant acquired his land with notice that his predecessors in title had given the covenant, and because the covenantors intended that the covenant should enure for the benefit of the persons who from time to time should be the owners of lots in Delta Park. The right, if any, of the plaintiffs comes from their ownership of some of the lots; their position is not improved by the assignment.

The order under which the issue was tried leaves the costs of the issue to be disposed of by the trial Judge; they will follow the event, and will be taxed upon the Supreme Court scale. The order further directs that in case an issue is tried the defendant's application under the Conveyancing and Law of Property

Act, 1922, for a modification of the restriction shall be reserved until after the trial of the issue. This I take to mean that the application, if it is renewed, must be brought on before Mr. Justice Kelly (who, being the Judge before whom the motion was made in the first instance, is, perhaps, the only Judge authorised by the Act to dispose of it). Therefore I express no opinion as to the effect of the evidence adduced as to the detriment or benefit that might result to any of the "persons principally concerned" from a variation or modification of the restriction.

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[IN CHAMBERS.]

[APPELLATE DIVISION.]

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*Parliamentary Elections—Recount by County Court Judge of Votes Cast at Dominion Election—Application to Judge of Supreme Court of Ontario for Direction to County Court Judge to Comply with Requirements of Dominion Elections Act, 10 & 11 Geo. V. ch. 46—Preliminary Objection—Return Made to Chief Electoral Officer—Secs. 71 and 72(4) of Act—"Pending an Application"—Time of Return and of Preliminary Order—Judicial Act—Fraction of Day—Omission, Neglect, or Refusal of County Court Judge to Count Ballots with Counterfoils Attached—Removal of Counterfoils—"May"—Imperative Duty—Sec. 62(3), 66, 70—"Inadvertently Omitted"—Remedial Statute—Liberal Construction—Order Directing County Court Judge to Comply with Act—Judge of Supreme Court Acting as Persona Designata—Appeal from—Jurisdiction of Appellate Court—Intituling of Order.*

An application under sec. 71 of the Dominion Elections Act was made to a Judge of the Supreme Court of Ontario, within the period of eight days allowed by the section, for an appointment to consider the matters complained of by the applicant, and a preliminary order was made by the Judge appointing a day for the hearing of the principal application, which was for a direction to a County Court Judge to comply with the requirements of the Act in connection with the recount of votes cast at an election. The day appointed fell within eight days of the date of the preliminary order, and the Judge of the Supreme Court proceeded to hear it, notwithstanding an objection that a return and report had, in the interval, been made to the Chief Electoral Officer under sec. 72(4) of the Act:—

*Held*, that, as the application for the preliminary order was well supported by affidavit and the applicant had complied with all the requirements of sec. 71, jurisdiction was conferred upon the Judge to make the preliminary order and to take all subsequent proceedings.

No provision of the Act requires that such an application shall be stayed or dismissed because the return or report prescribed by subsec. 4 of sec. 72 is made; and subsec. 4 itself has not that effect.

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The words "pending an application," in subsec. 4, mean "while awaiting an application."

The return as corrected upon the recount was said to have been received by the Chief Electoral Officer about 11 a.m. on the day on which the preliminary order was made: such order was a judicial act, and it related back to the earliest moment of the day, and was, therefore, prior in time to the receipt of the return by the Chief Electoral Officer.

The applicant complained that the County Court Judge omitted, neglected, or refused to count any of the ballots cast at three polling subdivisions in the riding and failed to remove therefrom the counterfoils, which should have been, but were not, removed by the deputy returning officers:—

*Held*, having regard to the provisions of secs. 62(3), 66, and 70 of the Act, that it was the duty of the County Court Judge to remove the counterfoils and count the ballots (if otherwise in proper form); there was omission, neglect, or refusal to comply with the provisions of the Act, within the meaning of sec. 71; and he should be directed to detach the counterfoils, complete the recount by including the ballots which he had not counted (if otherwise proper to be allowed), and correct and complete the final addition.

A voter who has complied with every requirement of the law should not be subjected to have his vote destroyed by the wrongful or improper act of an election officer.

*In re Wentworth Election* (1905), 9 O.L.R. 201, 204, applied.

The expression "inadvertently omitted," in sec. 62(3), is wide enough to include omission through ignorance of the law, carelessness, negligence, or inattention.

Notwithstanding the use of the word "may" in sec. 62(3), the duty to remove the counterfoils and count the ballots as if the counterfoils had been removed at the proper time, is an imperative one; but the removal of the counterfoils is not a condition precedent to the counting of the ballots.

The statute, being remedial, should be given a liberal construction. Review of the authorities.

The order of the Judge of the Supreme Court upon an application under sec. 71 is made by him as *persona designata*, and there is no appeal therefrom to a Divisional Court of the Appellate Division.

*Per MASTEN, J.A.*:—The order as drawn up and issued being intitled "in the Supreme Court of Ontario," if there was any right to amend it or set it aside, on the ground that it was void because the Supreme Court had no jurisdiction, that right must be exercised by a Judge sitting in Weekly Court.

APPLICATION under sec. 71 of the Dominions Elections Act, 10 & 11 Geo. V. ch. 46, for a direction to a County Court Judge in regard to the recount of votes cast at an election.

December 1, 4, and 5. The application was heard by WRIGHT, J., in Chambers.

*The Hon. N. W. Rowell, K.C., J. H. Spence, K.C., and R. Vanstone*, for the applicant.

*Shirley Denison, K.C., and G. C. Price*, for the respondent.

December 10. WRIGHT, J.:—This is an application by John Warwick King, one of the candidates for the riding of North

Huron at the recent Dominion elections held on the 29th October last, under sec. 71 of the Dominion Elections Act, for an order requiring and directing the Judge of the County Court of the County of Huron to comply with the requirements of that Act in connection with the recount of votes cast at the said election.

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An *ex parte* application was made to me on Thursday the 26th November, 1925, under sec. 71, for a preliminary order or appointment to consider the matters complained of. On the said date I made an order appointing the 1st day of December, 1925, for the hearing of the said application.

The application was supported by the affidavits of the said John Warwick King and Russell Bissett, Oliver Hemmingway, and James Franklin Collins, the three latter being electors whose ballots were affected by the action of the County Court Judge.

Upon the return of the motion, Mr. Denison, K.C., counsel for George W. Spotton the other candidate at the said election, took several preliminary objections to the proceedings, but on the hearing of the motion I overruled all the objections taken except one, with which I shall now deal.

It was contended on behalf of George W. Spotton that, as a return and report had been made to the Chief Electoral Officer under subsec. 4 of sec. 72, the application before me should not be proceeded with, as, in order to give an order made by me any effect, it would amount to the unseating of the candidate who had been returned and gazetted.

I do not think this objection is well founded. When the application was made to me under sec. 71, it was, in my opinion, well supported by the affidavits filed in support thereof, and the applicant had complied with all the requirements of that section to entitle him to the order then made. Under these circumstances, I think, jurisdiction was clearly conferred upon me to make the preliminary order and appointment and to take all subsequent proceedings in connection with the hearing of the application.

There is no provision in the Act which requires or directs that such application shall be stayed or dismissed if a return and report prescribed by subsec. 4 of sec. 72 is made; and, in the absence of any express provision to the contrary, I deem it to be the duty of the Judge of the Supreme Court who is hearing such an application to proceed with the application, if made within the time prescribed by sec. 71 and on sufficient material. If the return has any such effect as contended for by Mr. Denison, then such effect must be given to it in some other forum.



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I am also of the opinion that subsec. 4 of sec. 72 has not the effect contended for. In my view it provides for just such a state of facts and circumstances as exists in the present case. It reads as follows:—

“In the event of the returning officer making a return and report to the Chief Electoral Officer not complying with the immediately preceding provisions, or making a return and report pending an application before a judge or court for an order commanding the judge to comply with the foregoing provisions for a recount or final addition, the Chief Electoral Officer shall, on presentation of an order of a judge or court having jurisdiction in respect of such application, return the said report and return, together with all election papers, to the returning officer.”

Something may turn upon the meaning of the term “pending an application,” but I think this expression clearly means “while awaiting an application.” See Webster’s Dictionary and Murray’s Dictionary; also *Regina v. Verral* (1895), 16 P.R. 444.

Construing the statute in this manner, full effect is given to the intention of the Act, which was to give the applicant a certain time, namely, eight days after the order of the County Court Judge, to make the application, and a further period of eight days within which to have such application considered.

Upon the argument there was some discussion as to the exact time when the corrected return was received by the Chief Electoral Officer. From correspondence with that official produced by Mr. Denison, it would appear to have been received about 11 a.m. on the 26th November, the very day upon which the application was first made to me. Mr. Denison asked permission to verify the exact hour at which the return was received, but I do not consider this material.

The order of the 26th November is in its nature a judicial act, and would therefore relate back to the earliest moment of that day, thus being prior to point of time to the receipt of the return by the Chief Electoral Officer. See *Buskey v. Canadian Pacific Railway Co.* (1905), 11 O.L.R. 1.

In point of fact, the Chief Electoral Officer complied with the provisions of subsec. 4 and returned the said report and return with all election papers to the returning officer, and, in my view, he acted properly and strictly in accordance with the Act. As already stated, this objection cannot prevail.

Proceeding now to a consideration of the application or motion, it will be noted that the applicant complains that on the recount which was held before his Honour E. N. Lewis, Judge of

the County Court of the County of Huron, on the 10th 12th, and 16th days of November, the said Judge by his decision or ruling, which was rendered on the 19th and 20th days of November, 1925, omitted, neglected, or refused to comply with the provisions of the Dominion Elections Act in respect of the recount or final addition of the votes cast thereat.\*

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\* The following reasons were given by the County Court Judge for his decision upon the recount:—

The returning officer's first certificate states that King received 5,342 votes; Spotton, 5,173 votes: total, 10,515 votes.

I personally handled and recounted all of the said votes, except those of three polls, hereinafter referred to; and I am indebted to the two senior counsel who were in the final argument and to the two junior counsel who were acting all the way through, for their assistance in my arduous task. I commend them for the fair and able manner in which they conducted their work throughout.

There were about 140 ballots, from 45 polls, objected to and laid aside for later consideration. I have sealed up all of the same, in separate envelopes, for their respective polls. Scattered among these ballots objected to, were a number with counterfoils on. These ballots, I found, came under sec. 62, subsec. 3, of the Dominion Elections Act, 1920, 10 & 11 Geo. V. ch. 46, and I allowed the same, they being otherwise in proper form. These I consider to have had the counterfoils left on the same by inadvertence.

On opening the packets said by the deputy returning officers' endorsements on the same to contain the following votes, viz.: poll No. 2, Grey, for King 88, for Spotton 24; poll No. 6, Grey, for King 90, for Spotton 39; poll No. 7, Ashfield, for King 82, for Spotton 19: making for King 260 votes and for Spotton 82 votes—an aggregate total of 342 votes—I found that all the ballots had their counterfoils attached. At once, without looking at the same or allowing the same to be looked at, except sufficiently to assure myself and counsel for the candidates what they were, I sealed the same up again, and reserved the same for future consideration.

Argument of counsel was delivered on the 15th November, 1925.

In forming the conclusion that I have reached, as to these three polls, and the ballots therein, I have consulted a great many authorities, and especially refer to the judgments in the *West Calgary Election Case* (1922), 64 Can. S.C.R. 235. At p. 254, Mignault, J., says:—

"At this late day, it is strange that citizens of this country should not be familiar with the manner of voting. And, however regrettable it may be that the will of the majority should not prevail, still that will must be expressed in the required manner. Otherwise it is of no effect."

See also *Re South Oxford Provincial Election* (1914), 32 O.L.R. 1. Mr. Justice Clute, delivering judgment, says (pp. 7 and 8):—

"The object of the Act is to secure complete secrecy in voting. The counterfoil is destroyed as soon as the deputy returning officer identifies the number of it with the number opposite the voter's name. The clause requiring the official stamp prevents fraud and gives security to those having the right to vote, by ensuring the use only of ballots issued by the returning officer, the identity of which

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The particular matters complained of are that the said Judge omitted, neglected, or refused to count any of the ballots cast at polling subdivisions Nos. 2 and 6 in the township of Grey and polling subdivision No. 7 in the township of Ashfield, in the said electoral district of North Huron, and to remove the counterfoils from such ballots.

As appears from the affidavits filed and in the certificate of

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shall be certified by the official seal furnished by the Clerk of the Crown in Chancery stamped on each ballot.

"To permit ballot papers not so stamped to be used would, in the language of Lindley, L.J., approved by Lord Blackburn, in *Young v. Mayor etc. of Leamington* (1883), 8 App. Cas. 517, at p. 522, in effect be repealing the Act of Parliament, and would deprive the public of that protection which Parliament intended to secure for them."

In *Stoddart v. Town of Owen Sound* (1912), 27 O.L.R. 221, at p. 230, Mr. Justice Lennox says:—

"Secrecy is now a basic principle of our municipal voting; and, if it is important in a municipal contest, it is vital in a vote upon a tense social question such as this. . . . It is the statutory method that gives meaning and validity to the vote."

I also refer to *Re South Waterloo Provincial Election* (1924), 55 O.L.R. 245. Here it is said (p. 250) that where irregularities at the polls are traceable to mistake or oversight or downright carelessness or ignorance of the officers responsible, it is impossible to say that the election was conducted in accordance with the principles laid down in the Act.

In *Rex ex rel. Jacques v. Mitchell* (1924), 55 O.L.R. 286, at p. 288, Mr. Justice Logie says:—

"If the election was not conducted in accordance with the principles laid down in the Act, the saving clause does not apply and the election must be voided."

Mr. Justice Strong, in the *Haldimand Election Case* (1888), 15 Can. S.C.R. 495, at p. 515, says:—

"I hold secrecy to be imposed as an absolute rule of public policy, and that it cannot be waived."

and that the loss is vital if it is not present. Secrecy is fundamental,

My own opinion is, that secrecy is the basic principle of the Act, and of the first necessity, the very life and meaning of the Act.

The saving clause in sec. 62, subsec. 3, is governed by the word "inadvertently;" and I interpret this clause to mean that if a deputy returning officer *unwittingly*, by mistake, forgets to remove a counterfoil, in the same manner that a bank-teller makes a mistake in counting a large parcel of bank-bills, the deputy returning officer, or the Judge making the recount, *may* remedy this omission, but this cannot possibly include the fault of a deputy returning officer who, either through wilfully mistaking the law, or through carelessness or ignorance, leaves a whole poll of ballots with counterfoils on.

I, accordingly, do not count the ballots for the said three polls, and I leave the same sealed up as above stated.

As one of the principal points involved was the non-compliance of three deputy returning officers with the requirements of the statute, there should be no costs to either party.



the County Court Judge, at such polling subdivisions the deputy returning officers' statements shewed as follows, namely:—

Poll No. 2, Grey .....	for King.....	88
	for Spotton....	24
Poll No. 6, Grey .....	for King.....	90
	for Spotton....	39
Poll No. 7, Ashfield .....	for King.....	82
	for Spotton....	19

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It is stated in the material filed and in the learned Judge's reasons for judgment that all these ballots had their counterfoils attached, but it is nowhere stated that there were any numbers or other marks of any kind on the said ballots or counterfoils except the marks placed thereon by the voter.

Upon the argument it was stated by counsel for the applicant that in at least one of these polling subdivisions there were no numbers on either the counterfoils or ballots. The ballots were produced in Court in sealed envelopes, but I doubted my right or power to open these or to inspect them, and preferred to rely upon the affidavits which were properly filed and the report or judgment of the County Court Judge.

I think the proper principle to be followed in dealing with this application is that enunciated by the late Sir William Meredith, when Chief Justice of the Common Pleas, in *In re Wentworth Election* (1905), 9 O.L.R. 201. At p. 204 he states as follows:—

“On principle, it appears to me most unjust that an elector who has complied with every requirement of the law as to the manner in which he shall evidence his will as to the choice of a member of Parliament, should be subjected to have his vote destroyed by the wrongful or improper act of an election officer in dealing with his ballot-paper, and the Court is bound, I think, if possible, to avoid construing such a provision so as to lead to that result.”

If the only objection to the counting of these ballots was that the counterfoils were attached to them, the decisions are practically unanimous to the effect that the ballots should be counted: *Digby Election Case* (1887), 23 C.L.J. 171; *North Simcoe Dominion Election* (1904), 41 C.L.J. 29; *London Dominion Election* (1904), 41 C.L.J. 39; *Dewdney Election Case*, [1925] 3 D.L.R. 770.

It is held in these cases that even before the recent amend-



Wright, J. ments to the Dominion Elections Act ballots upon which the counterfoils were left should be counted.

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These decisions, however, do not deal with the effect of numbers placed either on the counterfoil or on the ballot by the deputy returning officer.

I shall now proceed to deal with the crucial question on the motion, namely, whether there was omission, neglect, or default on the part of the County Court Judge, within the meaning of subsec. 1 of sec. 71 of the Dominion Elections Act.

It will be noted that this section provides as follows:—

“In case of any omission, neglect or refusal of the judge to comply with the foregoing provisions in respect of the recount or final addition or to proceed therewith, any party aggrieved may, within eight days thereafter, make application,” etc.

The statement of what occurred on the recount will be found in the affidavit of John Walker King, the applicant, and in the report or reasons for judgment of the learned County Court Judge, where in referring to the ballots cast in the three polling subdivisions referred to, he says: “I found that all the ballots had their counterfoils attached. At once, without looking at the same or allowing the same to be looked at, except sufficiently to assure myself and counsel for the candidates what they were, I sealed the same up again and reserved the same for future consideration.” After citing authorities, he makes his ruling as follows: “I, accordingly, do not count the ballots for the said three polls, and I leave the same sealed up as above stated.”

The question for me to determine is, was this action on the part of the County Court Judge an omission, neglect, or refusal, within the meaning of sec. 71, to comply with the foregoing provisions in respect of the recount or final addition? And it is therefore necessary to consider what the foregoing provisions in respect of the recount or final addition are.

In passing it might be well to refer to sec. 66 of the Act, which defines the duties of the deputy returning officer in connection with the counting and reporting the vote. Subsection 2 specifies the duties of the returning officer as to the rejection of ballot papers, and provides as follows:—

“2. In counting the votes, the deputy returning officer shall reject all ballot papers,—

(a) which have not been supplied by him; or,

(b) by which votes have been given for more candidates than are to be elected; or,

(c) upon which there is any writing or mark by which the voter could be identified other than the numbering by the deputy

returning officer in the case hereinbefore referred to, but *no ballot paper shall be rejected on account of any writing, number or mark placed thereon by any deputy returning officer.*"

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The words in italics were added by the amendment of 1908, 7 & 8 Edw. VII. ch. 26, sec. 21. This amendment was evidently made in consequence of the decision in the *Wentworth Election* case, already referred to. In that case it was held that in the circumstances the marks or numbers placed on the ballots by the deputy returning officer had the effect of voiding the election; but, in view of the amendment and the present provisions of the statute, that decision could not now apply.

The powers and duties of the Judge of the County Court on a recount are set forth in sec. 70 of the Dominion Elections Act. The particular subsection that deals with the matters arising on this application is subsec. 4, which states:—

"In the case of a recount, the judge shall recount the votes according to the directions in this Act set forth for deputy returning officers at the close of the poll, and shall verify or correct the ballot paper account and statement of the number of votes given for each candidate," etc.

This section expressly directs the Judge on the recount to observe the provisions of subsec. 2 of sec. 66, already referred to, and prohibits him from rejecting any ballot paper on account of any writing, number, or mark placed thereon by any deputy returning officer as provided for in subsec. 2 (c) of sec. 66, already cited.

The duties of a deputy returning officer as to dealing with counterfoils when the voter returns his ballot to him, and also his duty when counterfoils are found attached to the ballot papers in the ballot-box, are prescribed by subsec. 3 of sec. 62. The latter part of that subsection provides as follows:—

"Provided that where the deputy returning officer has inadvertently omitted to remove the counterfoil from the ballot paper before placing such ballot paper in the ballot box, he may, exercising care, however, that the number of such counterfoil be not seen by any person present and without himself examining such number, remove and destroy such counterfoil at the counting of the ballots; and the judge who may conduct any recount proceedings shall have the like power, inadvertence on the part of the deputy returning officer being, for the purposes of the recount, presumed. The ballots, if otherwise in proper form, shall be counted as if the counterfoil had been at the proper time removed therefrom."

Here is an express direction not only to the deputy returning

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officer but also to the Judge conducting the recount as to how the ballots with counterfoils attached shall be dealt with, first, on the count of the deputy returning officer and again by the County Court Judge on the recount.

On the hearing of the application a great deal of argument was directed to the meaning of the expression "inadvertently omitted." For the respondent on the application it was contended that where, as in the present instance, all the counterfoils were left on the ballots, it could not be said that it was an inadvertent omission. The weight of authority, in fact practically all the authorities, are to the effect that "inadvertently" is a wide enough term to include ignorance of the law, carelessness, negligence, or inattention. See *Nichol v. Fearby*, [1923] 1 K.B. 480, particularly at p. 498; *In re Jackson & Co. Ltd.*, [1899] 1 Ch. 348; *Stepney Case* (1892), 4 O'M. & H. 178; *Ex p. Walker* (1889), 22 Q.B.D. 384; *Ex p. Lenanton* (1889), 53 J.P. 263. The dictionaries give various meanings for the word, including inattention, carelessness or negligence, and for the purpose of this decision I shall hold that the term "inadvertently" includes ignorance of the law, inattention, neglect or carelessness, on the part of the deputy returning officer.

It will be observed that when on opening the ballot-box the deputy returning officer finds the counterfoils, he *may*, exercising care, etc., remove and destroy such counterfoils. It was contended by counsel for the respondent that it was only discretionary with the deputy returning officer to remove these counterfoils; but, as it was a public duty he had to perform, the principle of the decisions in *Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214, *In re Eyre and Corporation of Leicester*, [1892] 1 Q.B. 136, and *Regina v. Tithe Commissioners for England and Wales* (1849), 14 Q.B. 459, at p. 474, would apply. In those cases it was held that where a public right or duty is involved, the word "may" is to be read as "shall" and the duty is to be deemed an imperative one. See Craies on Statute Law, 4th ed., p. 252; Maxwell on the Interpretation of Statutes, 6th ed., pp. 424 and 438, and cases there cited. Thus it was the imperative duty of the deputy returning officer to remove the counterfoils, and the same section declares that the Judge who may conduct any recount proceedings shall have the like power; and, having the power, it was, under the circumstances, his duty to exercise it.

Where the deputy returning officer fails to remove the counterfoils, inadvertence on his part shall, for the purpose of the recount, be presumed. This is the express declaration of the statute; and, as no other evidence was or could be adduced be-

fore the Judge, this is a conclusive and irrebuttable presumption. See *Cole v. Porteous* (1892), 19 A.R. 111; Halsbury's Laws of England, vol. 27, paras. 235 and 262.

In my view, it is quite immaterial whether or not the counterfoils were removed by the deputy returning officer or even by the Judge conducting the recount, as subsec. 3 of sec. 62, already cited, distinctly provides that "The ballots, if otherwise in proper form, shall be counted as if the counterfoil had been at the proper time removed therefrom."

It is not, in my view, a condition precedent to the counting of the ballots that the counterfoils shall be removed; but, as already stated, I am of the opinion that it was the plain and positive duty of the County Court Judge to remove the counterfoils.

Clearly it also was his duty to count these ballots if otherwise in proper form. The proper form is a matter in which he is to exercise his judgment, but as to the counting there is a clear and distinct provision of the Act which should have been observed.

Holding these views, I find that there was omission, neglect, or refusal on the part of the learned County Court Judge to comply with the provisions of the Dominion Elections Act in respect of the recounting of the votes and consequently of the final addition.

It was contended by counsel for the respondent on the motion that sec. 71 does not confer upon a Judge of the Supreme Court a right to review or sit in appeal from the decision of the County Court Judge who conducted the recount. Probably that is the correct interpretation or construction to be placed upon that section, but the language of the statute is clear and explicit to the effect that where the Judge holding the recount omits, neglects, or refuses to comply with the provisions of the Act, relief may be had on an application such as this, and the Judge directed to comply with the provisions of the Act.

While not purporting to give a right of appeal from the decision of the Judge holding the recount, the statute clearly points out the manner in which such recount is to be conducted and the directions to be observed in the counting of the ballots. In the event of an omission, neglect, or refusal on the part of the Judge holding the recount to comply with such provisions, the statute provides the remedy by means of such an application as the present.

The law would indeed be impotent if in a case like the present, where 342 voters were deprived of their franchise, no relief could be had. Where the voters have done everything in their power to register their votes by way of ballot in the pro-

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Wright, J. per form, every reasonable construction should be placed on the  
1925. statute to give effect to the expressed will of the voters. To do  
otherwise would amount to a declaration that, however perfectly  
RE NORTH the ballot might be marked, the deputy returning officer, either  
HURON willfully or carelessly and negligently, might destroy the ballot  
ELECTION. and prevent the vote being counted.

The statute is remedial and ought to be given a liberal construction so as to provide the remedy and correct the injustice aimed at.

The judgment of Sir Montague E. Smith, in *Dupueto v. James Wyllie & Co.* (1874), L.R. 5 P.C. 482, is particularly applicable in construing the provisions of the Act now under consideration. In delivering the judgment of the Judicial Committee he states at p. 492: "The statute being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow."

See also the judgment of Brett, J., in *Gover's Case* (1875), 1 Ch. D. 182, where at p. 198 he states: "If the enactment be manifestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will permit." Also the judgment of Lord Blackburn in *Brodlaugh v. Clarke* (1883), 8 App. Cass, 354, where at p. 373 he states: "When a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the Legislature, and to attain the object for which it was passed."

The order will therefore go requiring and directing the learned County Court Judge as follows:—

1. To proceed with and complete the recount so far as necessary to carry out the directions of the judgment.
2. To detach the counterfoils from the ballots in question.
3. To count the said ballots, if otherwise in proper form, as if the counterfoil had been at the proper time removed therefrom.
4. To correct and complete the final addition so as to give effect to the recount when conducted according to the directions contained in this judgment.

As the respondent appeared on the motion and contended that he should have the benefit of the decision of the County Court Judge, there is no reason why he should not pay the costs of this application, and I, therefore, order that the respondent,

George W. Spotton, pay the costs of and incidental to this application. Wright, J.  
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The order made by WRIGHT, J., was drawn up, intituled, and issued in the Supreme Court of Ontario. RE NORTH  
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George W. Spotton, pursuant to leave granted by MOWAT, J., lodged an appeal from the order of WRIGHT, J.

December 18. The appeal came on for hearing before LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

*The Hon. N. W. Rowell, K.C., and J. H. Spence, K.C.,* for John Warwick King, respondent, took the preliminary objection that there was no jurisdiction to hear the appeal because WRIGHT, J., in making the order, was acting as *persona designata* only.

*I. F. Hellmuth, K.C., and Price,* for the appellant, in answer to the objection, argued that the appeal was not from the order of WRIGHT, J., as *persona designata*, but from his order as a Justice of the Supreme Court of Ontario—an order from which an appeal lay. The proceedings were intituled in the Supreme Court of Ontario, the order was issued from the Supreme Court; and, the Supreme Court not having any jurisdiction in the matter under the provisions of the Dominion Elections Act, the proceedings and order were void and of no effect. An appeal lies from an order void for want of jurisdiction. The County Court Judge considered that he had a discretion under sec. 62(3) of the Act—the word “may” being permissive. Reference to *Re Pacquette* (1886), 11 P. R. 463, particularly at pp. 469 and 470; *Re Young* (1891), 14 P.R. 303; *Re Simpson and Clafferty* (1899), 18 P.R. 402; *Canadian Northern Ontario Railway Co. v. Smith* (1914), 50 Can. S.C.R. 476.

Counsel for the respondent were not called upon to reply.

LATCHFORD, C.J. (at the conclusion of the argument for the appellant):—We are all of the opinion that the Court has no jurisdiction to entertain this appeal. The order appealed from was made by Mr. Justice Wright, sitting as *persona designata* under sec. 71 of the Dominion Elections Act, and that Act gives no appeal from an order so made. No power is given the Court in such a case by any other statute. The appeal is therefore dismissed with costs.

MASTEN, J.A.:—I concur in the dismissal of this appeal on the ground that this is in fact a proceeding under the Dominion

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Elections Act, and the improper intituling of the order, in the style of cause, as in the Supreme Court, cannot alter its real nature or confer on this Court a substantive appellate jurisdiction, which could be created only by the Dominion Parliament. Nor has this Divisional Court, in my view, power to correct or amend the records or to set aside these proceedings in the Court below because they are so intituled. No such jurisdiction is conferred on a Divisional Court by the Ontario Judicature Act or by any other Ontario Act that has been brought to our notice. If any such power exists, it must, I think, be exercised by a single Judge sitting in Weekly Court, and not by an appellate tribunal.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

1925.

MUSSON v. HEAD.

Dec. 16.

*Vendor and Purchaser—Acceptance of Offer for Exchange of Properties Signed by Husband of Owner of one—Agency—Parol Evidence to Prove—Assertion of Ownership by Husband—Contract for Payment of Commission to Agent Included in Written Acceptance—"My Property"—"And the same shall Form Part of the Purchase-money"—Words not Forming Part of Contract of Exchange.*

The plaintiff offered in writing to exchange his property in R. for property in T. The offer was made to H., the husband of the owner of the property in T., but nothing was said in the offer as to the ownership of the T. property. H. signed a written acceptance of the offer, upon the same piece of paper, in these words: "I . . . do hereby accept the above offer . . . and do hereby agree to carry out the same . . . and agree to pay the usual commission on total price of *my property* herein mentioned on execution of this agreement to" W., a land-agent, "and the same shall form part of the purchase-money." H. was acting as agent for his wife and she authorised his signature to the acceptance:—

*Held*, following *Katzman v. Ownahome Realty Co.*, [1924] S.C.R. 18, that parol evidence will not be admitted to shew that a contract entered into by a person in his own name was in truth entered into by him as agent of another, if in the contract itself there is that which shews that the person contracting was contracting as owner and not as agent.

But the assertion of H. ("my property") that the T. property was his was no part of the contract between H. and the plaintiff; it was in reality part of a separate contract between H. and the land-agent; and it was open to the plaintiff to shew that H. was acting as the duly authorised agent of his wife.

The words "and the same shall form part of the purchase-money" were intended to have the effect of an assignment to the land-agent of a portion of the purchase-money equal to his commission, and were no part of the contract between the plaintiff and H.

Judgment of RIDDELL, J., affirmed.

AN appeal by the defendants from the judgment of RIDDELL, J., 57 O.L.R. 38. App. Div.

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May 1. The appeal was heard by LATCHFORD, C.J., MIDDLETON, J.A., LENNOX, J., and ORDE, J.A.

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*M. A. Secord*, K.C., and *C. H. Porter*, for the appellants.

*Gideon Grant*, K.C., and *P. E. F. Smily*, for the plaintiff, respondent.

December 16. The judgment of the Court was read by MIDDLETON, J.A.:—Appeal by the defendants from the judgment of Mr. Justice Riddell at the trial of the action, dated the 27th March, 1925, granting specific performance of an agreement for the exchange of certain lands.

The agreement consists of an offer, bearing date the 9th September, 1924, by which Samuel Musson offered George Head to exchange his, Musson's, property in the township of Reach for a certain apartment-house in Toronto. In this offer Musson describes the Reach property as his property, but nothing is said as to the ownership of the apartment-house. On the same day Head signed an acceptance of this offer, which reads as follows:—

"I, George Head, do hereby accept the above offer of Samuel Musson to exchange, and conditions thereto, and do hereby agree to carry out the same on the terms and conditions above named and agree to pay the usual commission on total price of my property herein mentioned on execution of this agreement to B. Williams Real Estate, and the same shall form part of the purchase-money."

It perhaps should be mentioned that at the foot of the offer, immediately above the date and the signature, there is this clause:—

"I agree to pay the regular commission on acceptance of this offer on total sale of my property herein mentioned to B. Williams Real Estate, and the same shall form part of the purchase-money."

George Head did not in fact own the Toronto property, but it belonged to his wife, Margaret J. Head. The learned trial Judge has found, and this finding cannot be questioned, that Head was acting as agent for his wife, and that she was a party to the whole transaction, and that she authorised his signature to this contract.

The Supreme Court of Canada in the case of *Katzman v. Ownahome Realty Co.*, [1924] S.C.R. 18, reaffirmed the principle, laid down in earlier cases, that it is not open to establish by



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parol evidence that a contract entered into by a person in his own name was in truth entered into by him as agent of another, if in the contract itself there is that which shews that the person contracting was contracting as owner and not as agent. To permit this to be done would be to vary the written agreement by parol evidence.

My learned brother Riddell has dealt with this case upon the theory that in this contract there is nothing to shew that Head in contracting was contracting as owner. His attention was apparently not drawn to the use of the expression "my property" in the acceptance, and so he does not discuss the only aspect of the case which presents any real difficulty—does the use of this expression bring the case within the principle relied upon?

The whole difficulty arises from the attempt of the agent to make sure of his commission. In 1916 the Statute of Frauds was amended by adding sec. 13, requiring all agreements for the payment of commissions to real estate agents to be in writing: 6 Geo. V. ch. 24, sec. 19. The device was then adopted by real estate agents of embodying in offers and acceptances that which would amount to a contract, by those who signed the offer and the acceptance, to pay commission to the real estate agent. The Courts held that this object was accomplished, and that the offer and acceptance really contained two contracts, the contract between the vendor and the purchaser and a secondary contract between the vendor or the purchaser, or both, and the real estate agent, for payment to him of his commission. This device being regarded by the legislature as to a large extent frustrating its intention, the statute was amended in 1918, and it was by the amendment (8 Geo. V. ch. 20, sec. 58) provided that the contract for the payment of commission must be a separate and distinct document from the contract between the vendor and purchaser; and so from that time on it has been regarded as an improper and futile thing to add clauses to the offer and acceptance, or either of them, such as are found in this case. See *Davis v. Beggs* (1919), 46 O.L.R. 169.

If the assertion of Head that the Toronto property is his property is any part of the contract between himself and Musson, the decision of my learned brother cannot be supported, for it would be in conflict with the *Katzman* case and the earlier cases, already referred to. I have, however, come to the conclusion that this document in truth constitutes two contracts, a contract between Musson and Head for the exchange of the lands, and a contract between Head and Williams for payment to him of a

commission upon the exchange. There is probably a third contract between Musson and Williams for payment by him of a commission upon the exchange of his property; and, having this in view, I think the assertion by Head of ownership is part of the contract between him and the real estate agent and forms no part of the contract between himself and Musson; and, therefore, it is open to Musson to shew that Head in making the contract was acting as agent for his wife, and that he was duly authorised thereunto when he signed the contract made by him for her.

The expression found in both the offer and acceptance, "and the same shall form part of the purchase-money," at first gave me some difficulty, but I think the intention was that it should have the effect of being an assignment to the real estate agent of a portion of the purchase-money equal to his commission, and that the words were not intended to have any meaning so far as the parties exchanging are concerned, and they form no part of the contract between them.

At the trial, judgment being given against the wife as principal, no order was made so far as George Head was concerned, save that he was directed to pay the costs of the litigation. Upon the hearing before us it was agreed that an order should be made upon this appeal dismissing the action so far as George Head was concerned without costs here or below; so, with this variation, the judgment should be affirmed, and the appellant Mrs. Head should pay the costs of this appeal.

*Judgment accordingly.*

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[APPELLATE DIVISION.]

RYAN v. MCGREGOR.

1925.

*Costs—Dismissal of Action with Costs to be Paid by Plaintiff to Defendants — No Liability for Costs Incurred by Defendants to Solicitors Conducting Defence—Solicitors Employed by Insurance Company pursuant to Contract of Indemnity—Principle of Reimbursement—Absence of Damnification—Authority of Decisions.*

Dec. 16.

The defendants were insured against loss from liability in respect of claims of the nature of that set up by the plaintiffs in this action. Under and pursuant to the terms of the policy, upon the claim being made the insurance company took over the defence, which was successful, the action being dismissed with costs. There being no obligation on the part of the defendants to the solicitors who conducted the defence under instructions from the insurance company:—

*Held*, that, as the action had caused the defendants no damnification, no costs could be allowed, having regard to the principle of reim-

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1925. bursement; and the Taxing Officer rightly refused to tax against the plaintiffs the costs of the solicitors who conducted the defence.  
 RYAN v. Review of the Ontario and English cases.  
 v. *Walker v. Gurney-Tilden Co.* (1899), 19 P.R. 12, applied and followed.  
 MCGREGOR. *Rex v. Archbishop of Canterbury*, [1903] 1 K.B. 289, considered.  
*Adams v. London Improved Motor Coach Builders Ltd.*, [1921] 1 K.B. 495, distinguished.  
*Semble*, there may be no real conflict between the English and the Ontario cases—the former possibly turn upon a finding of liability to the solicitor.

AN appeal by the defendants from the ruling of the Taxing Officer that the costs of successfully defending this action could not be taxed against the plaintiffs because the defendants had incurred no liability for costs to the solicitors who conducted the defence, those solicitors being employed not by the defendants but by a liability insurance company.

The appeal was referred to a Divisional Court of the Appellate Division by ROSE, J., before whom it first came, in Chambers: see 29 O.W.N. 171.

November 30. The appeal was heard by LATCHFORD, C.J., MIDDLETON and MASTEN, J.J.A., and LOGIE, J.

A. C. Heighington, for the appellants, argued that the solicitors in this case were acting for the appellants (defendants in the action), although doing so at the instance of the insurance company. If the interests of the insurance company and those of the defendants had conflicted, the solicitors would have had to attend to the interests of the defendants. Therefore the defendants should be allowed to tax their costs. The case of *Walker v. Gurney-Tilden Co.* (1899), 19 P.R. 12, was different in many respects. The action in the present case was for \$10,000 and the indemnity was for only \$5,000. The *Walker* case was considered in *Simpson v. Local Board of Health of Belleville* (1917), 41 O.L.R. 320. The onus of shewing a definite agreement that the defendants would not be liable to the solicitors for the costs of the defence was on the plaintiffs. And at any rate down to the time when there was a change of solicitors the defendants should be allowed to tax costs. As to the principle to be applied, counsel referred to *Rex v. Archbishop of Canterbury*, [1903] 1 K.B. 289, at p. 295, and to *Adams v. London Improved Motor Coach Builders Ltd.*, [1921] 1 K.B. 495. He suggested that the *Walker* case should be reconsidered in view of the decisions in the last two named cases.

T. F. Battle, for the plaintiffs, respondents, contended that upon the principle given effect to in the *Walker* case the costs

could not be allowed to be taxed. The principle was that if the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party. This principle was first enunciated in this Province in the case of *Jarvis v. Great Western Railway Co.* (1859), 8 U.C.C.P. 280, and had been consistently followed since, notably in the *Walker* case and in *Meriden Britannia Co. v. Braden* (1895-6), 16 P.R. 410, 17 P.R. 77, and *Gough v. Toronto and York Radial Railway Co.* (1918), 42 O.L.R. 415. He also referred to *Gundry v. Sainsbury*, [1910] 1 K.B. 645. There was no obligation in the present case on the part of the defendants to the solicitors. The insurance policy itself shewed this to be so. Therefore the onus referred to was satisfied. As costs are to be awarded to a litigant as reimbursement, they should not be allowed here.

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December 16. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by the defendants from a certificate of the Taxing Officer, referred to the Appellate Division by Mr. Justice Rose under the provisions of sec. 32 of the Judicature Act.

The action was brought to recover damages. The defendants were insured by the Union Insurance Society of Canton against loss from liability in respect of claims of the nature of that set up by the plaintiffs. Under and pursuant to the terms of the policy, upon the claim being made the insurance company took over the defence, which was successful, and the action was dismissed with costs.

Upon a bill of costs being taken before the Taxing Officer, it was objected that, save as to some items not now in dispute, the costs could not be allowed to the defendants, upon the principle given effect to in the case of *Walker v. Gurney-Tilden Co.*, 19 P.R. 12.

Upon appeal being had from the ruling of the Taxing Officer, Mr. Justice Rose came to the conclusion that, in view of certain authorities cited to him, the decision in the *Walker* case ought to be reconsidered, and he therefore referred the case to the Divisional Court.

Upon the argument before us, some attempt was made to challenge the accuracy of the finding of fact by the Taxing Officer; but, as the case only reached this Court for the purpose of having the question of principle discussed, I decline to enter into any discussion of the finding of fact, beyond saying that nothing said upon the argument led me to suppose that the Taxing Officer in any way erred in this regard. I therefore proceed to



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 1925. torily proved that the solicitors conducting the defence were em-  
 RYAN. ployed by the insurance company, and that they were not in fact  
 v. retained by the defendants in such a way as to make the defen-  
 McGREGOR. dants liable for their costs.

Middleton, The fundamental principle is thus clearly stated by Baron  
 J.A. Bramwell in the case of *Harold v. Smith* (1860), 5 H. & N. 381,  
 385: "Costs as between party and party are given by the law  
 as an indemnity to the person entitled to them: they are not im-  
 posed as a punishment on the party who pays them, nor given as  
 a bonus to the party who receives them. Therefore, if the extent  
 of the damnification can be found out, the extent to which costs  
 ought to be allowed is also ascertained." This was not then put  
 forward as any new idea. It is a particularly clear statement of  
 the principle, in a case dealing with a matter widely different  
 from that to be here discussed. I quote it, however, because in the  
 case of *Gundry v. Sainsbury*, [1910] 1 K.B. 645, the Court of  
 Appeal accepted it as unchallengeable law, and for that reason  
 refused any costs to the plaintiff, who had stated that his soli-  
 citor had agreed to conduct the litigation for him without charg-  
 ing him any costs. Being under no liability, he needed no in-  
 demnity. I also quote this case because the Master of the Rolls,  
 in the decision in 1910, referred to the decision in *Harold v.*  
*Smith* as definitely formulating a principle of general applica-  
 tion, and stated (at p. 649), "That is a decision which has re-  
 mained undisturbed for fifty years, and I am not prepared to de-  
 part from it."

It must also be borne in mind that the question under dis-  
 cussion does not in any way deal with the right of the solicitor  
 as against his client or any one with whom he may have a con-  
 tract. The costs which are under discussion are in the nature  
 of damages awarded to the successful litigant against the un-  
 successful, and by way of compensation for the expense to which  
 he has been put by the suit improperly brought. The foundation  
 of the power of the Common Law Courts to award costs was  
 purely statutory. The Courts, to use the language of an old  
 statute, were authorised to direct the unsuccessful litigant "to  
 make recompense to the party unjustly vexed for the said unjust  
 vexation."

Very early in the judicial history of this Province, a cognate  
 question arose, and in the case of *Jarvis v. Great Western Rail-  
 way Co.*, 8 U.C.C.P. 280, the Court had to consider the problem  
 presented by an agreement between the defendant company and  
 its attorney under which the company paid to the attorney an

annual salary. In the event of litigation the attorney was entitled to claim against the company his actual disbursements, and he was to be entitled to keep for himself all costs which he might recover from adverse litigants. It was argued that this precluded the company from recovering anything but disbursements from the unsuccessful plaintiff. After a very careful examination of all the authorities, Chief Justice Draper, giving the judgment of the full Court, held (p. 288) that "the principle of reimbursement must govern," and, therefore, the company, not having to pay anything to the solicitors beyond disbursements as a result of the litigation brought, could recover nothing beyond the disbursements so paid. That decision has stood in our Courts for well nigh seventy years—I will not say unchallenged, but, whenever challenged, followed—and the principle has been applied as governing in very varied circumstances.

In *Stevenson v. City of Kingston* (1880), 31 U.C.C.P. 333, the question was very fully discussed before the full Court. The municipality had employed a solicitor upon a salary, and the solicitor, under the agreement, was to have the right to costs recovered from litigants against whom the corporation should succeed. Chief Justice Wilson thought the case of *Galloway v. London Corporation* (1867), L.R. 4 Eq. 90, shewed that the *Jarvis* case had not been well decided, but Mr. Justice Osler, with whom Mr. Justice Galt concurred, took the opposite view, and he points out, as would be apparent from a careful reading of the *Galloway* case, that there was little in it to give any encouragement to the appellant. I attach particular value to this decision, because the late Mr. Justice Osler was probably the most experienced Judge upon matters of this kind that ever sat in an Ontario Court.

In the case of *Ottawa Gas Co. v. City of Ottawa* (1902), 4 O.L.R. 656, 5 O.L.R. 246, the question was again discussed under precisely similar circumstances, before a Divisional Court, and the *Jarvis* case was again followed, notwithstanding the added weight of the decision in *Henderson v. Merthyr Tydfil Urban District Council*, [1900] 1 Q.B. 434, to the divergent line of English authority, Chief Justice Sir William Meredith saying (4 O.L.R. at p. 658): "It seems to us that we ought to follow what we understand to be the principle of the decision in *Jarvis v. Great Western Railway Co.*, which, as I have said, has been recognised and acted upon, and which is the well understood rule in this Province." Upon motion made for leave to appeal to the Court of Appeal, Chief Justice Moss refused leave, stating (5 O.L.R. at p. 248): "Having regard to the legislation, and to

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the prior decisions, and the clear recognition of their authority in subsequent cases, I ought not to give leave to open a discussion of them with a view to the adoption of the rule of the English cases, at the instance of a municipal corporation. So far as this Province is concerned the question is really settled by this Court in *Meriden Britannia Co. v. Braden*, 17 P.R. 77."

In the *Ottawa* case attention is drawn to the fact that the law as laid down by the Courts was to some extent sanctioned by the Legislature, which enacted an amendment to the Municipal Act, the year after the decision in *Stevenson v. City of Kingston*, enabling a municipal corporation to collect the costs of cases in which it succeeded notwithstanding the employment of a solicitor at a salary, when by the terms of the employment the costs were payable to the solicitor as part of his remuneration, and in addition to his salary. The difficulty that gave rise to discussion in the *Ottawa* case was occasioned by the fact that the corporation there had not passed the necessary by-law under the provisions of the amended Act.

In bringing together these cases dealing with the effect of agreement to pay a solicitor a fixed salary, I have passed over the very important decision of *Meriden Britannia Co. v. Braden* (*supra*). In that case a party litigant was defended by a solicitor representing another interested party, upon a distinct bargain that he should not be liable to the solicitor for costs. As a result of the action he was awarded costs, but it was held that he could recover no solicitor's fees, and the case of *Jarvis v. Great Western Railway Co.* received the sanction of the approval of the Court of Appeal, Mr. Justice Osler stating: "It rests on a sound principle, and we cannot reverse the judgment now in appeal without overruling it and the case in which it was followed many years afterwards, *Stevenson v. City of Kingston*."

In the English Courts, where suitors are allowed the services of solicitor and counsel when suing in *formâ pauperis*, there can be no recovery for costs because there is no liability to the solicitor or counsel: *Carson v. Pickersgill* (1885), 14 Q.B.D. 859; *Richardson v. Richardson*, [1895] P. 346; and, upon the same reasoning, a married woman, who had not made a binding contract of retainer with her attorney because she had no separate estate, was not allowed to tax costs against an unsuccessful opponent: *Clark v. Creighton* (1882), 9 P.R. 125.

This being the state of the authorities, one is not at all surprised by the decision in *Walker v. Gurney-Tilden Co.* (*supra*). There the late Chief Justice Meredith held that where the defendant was defended by solicitors employed by the insurance



company the case was brought within the rule established in *Jarvis v. Great Western Railway Co.* and other similar cases, and that if the client be not liable to pay costs to his solicitor he cannot have judgment to recover such costs against the opposite party, the test being always whether the solicitor can successfully maintain an action against the client for the costs in question. Since that decision, although there has been some grumbling, the rule has been regarded as established.

It is now suggested that this case ought to be reconsidered because of two decisions in England: *Rex v. Archbishop of Canterbury*, [1903] 1 K.B. 289, and *Adams v. London Improved Motor Coach Builders Ltd.*, [1921] 1 K.B. 495.

In the case of the *Archbishop*, a prerogative writ of mandamus had been sought in a matter affecting the rights of the Crown. The Archbishop not being personally concerned, cause was shewn by the Law Officers of the Crown under instructions from the Solicitor of the Treasury. The Archbishop was awarded costs, and upon the taxation it was contended that no costs could be taxed to him, for several reasons. It was said that it was an attempt to recover costs for the Crown, and the Crown did not receive costs, and that the Solicitor of the Treasury was not authorised to appear for any private person, and that the Archbishop could not recover the costs because the Crown took the case out of his hands, and he needed no indemnity. All these objections were overruled. The Master of the Rolls disposes of the only question relevant here very shortly (p. 293): "He is none the less solicitor for the subject because he is put on the record at the instance of the Crown." Lord Justice Romer discusses the matter with much more detail, holding that there was in fact the relationship of solicitor and client, although the defence was conducted by the Crown and although the statement which is the foundation of this appeal was made (p. 295): "The case cannot, to my mind, be substantially differentiated from that of an ordinary defendant who is in some such position as that of a master who is being sued by a servant where the master is insured against liability. There the insurance company defends on behalf of the defendant, and generally employs its own solicitor; but although that solicitor would primarily not look to the defendant personally for costs, yet, so far as the plaintiff in that action is concerned, that solicitor is, for all purposes, as between plaintiff and defendant, the solicitor for the defendant. In such a case, if the defendant is awarded costs, those costs would be recoverable by him. and, in estimating what the amount of those costs is, he would naturally and properly include among his costs those of

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App. Div. the solicitor who acted for him in that case, although, as between  
1925. him and the insurance company, the solicitor was the solicitor  
for the insurance company, and the insurance company had to  
RYAN see that the costs were provided by them if the defendant did not  
v. succeed.”  
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Middleton, This is unquestionably directly opposed to the decisions in  
J.A. our Courts, but its value is greatly weakened because the question here relied upon does not appear to have been discussed, and the English cases upon which our decisions are founded were not even mentioned—the point scarcely appears to have been raised.

*Adams v. London Improved Motor Coach Builders Ltd.* (*supra*) is a decision more nearly in point. The plaintiff was a member of a Trade Union. The by-laws of the Union provided for legal defence. The plaintiff sued through his solicitors acting for the Union. He was awarded costs, and was held entitled to recover the normal solicitors' costs, the decision being based on the ground that the Union, acting on the plaintiff's behalf, engaged the solicitors to act for him, and they became his solicitors, and he was liable to them for payment of their costs, there being no agreement with them that he should not under any circumstances be liable to them for their costs, and the liability was excluded from the assumption that the Union also undertook to pay the solicitors' costs. This decision differs from the case in hand because here on the finding of the Taxing Officer the defendants were not liable to the solicitors, and from the judgment in that case it would appear that this was the turning point in the decision.

In the result I am of opinion that there is nothing to suggest that the case of *Walker v. Gurney-Tilden Co.* was not well decided. It appears to be the logical outcome of the decision in the *Jarvis* case, which has been the recognised law of the Province for many years, and which not only has the sanction of the former Court of Appeal, but, as has already been pointed out, had thirty years ago been recognised as law for so long that it ought not even then to be disturbed. Further, I am far from satisfied that, even were we approaching the matter untrammelled by that decision, the English authorities relied upon should lead us to the contrary conclusion. If costs are to be paid on the theory that they had been incurred by the successful party by reason of the bringing of an action against him, he cannot be said to have been put to any costs by reason of the bringing of the action, but had chosen to insure himself against liability of the kind in question, and he had parted with his insurance premium

long before the action was contemplated, and, indeed, long before the occurrences given rise to the action.

In matters of this kind the rule *stare decisis* should be applied, and should not be readily departed from.

To avoid any misunderstanding of this decision, I emphasise the fact that it is based upon the finding that there was no obligation on the part of the defendants to the solicitors; and so, the action having caused no "damnification," no costs could be allowed, having regard to the "principle of reimbursement." If the solicitors had been retained by the defendants in such a way as to render them liable to an action, then the test suggested in *Walker v. Gurney-Tilden Co.* would have been met, and the mere fact that the defendants had an agreement binding the insurance company to indemnify them would not free the plaintiffs from their obligation to pay full costs. In fact, if the insurance company should pay the costs, it would be subrogated to the defendants' right to recover against the plaintiffs, for the costs awarded against the plaintiffs are in the nature of damages awarded against them for the wrongful bringing of their unsuccessful action. An insurance company, having paid in pursuance of the contract of indemnity, is always subrogated to the right of action against the wrongdoer.

In this view, there may be no real conflict between the English and the Ontario cases. The former possibly turn upon a finding of liability to the solicitor—in none is there a discussion of the situation where there is no liability.

The appeal fails and should be dismissed with costs.

*Appeal dismissed with costs.*

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#### [APPELLATE DIVISION.]

1925.

REX v. O'KEEFE'S BEVERAGES LTD.

Dec. 16.

*Ontario Temperance Act—Magistrate's Conviction of Brewers for Offence against sec. 40—Sale of Intoxicating Liquor—No Evidence of "Sale"—Sec. 2(k) of Act—"Traffic," Meaning of.*

One F. ordered from the defendants, brewers, 20 cases of 2½ per cent. beer, that is, beer which could legally be sold in Ontario. The order was not acknowledged by the defendants; but they shipped to Mrs. W., a relative of F., 50 cases, some of which contained beer the alcoholic contents of which were greater than allowed by law. F.

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and Mrs. W. refused to accept the shipment or any part of it, because it had been sent at the wrong time and too many cases had been shipped. The defendants were convicted by a magistrate of the offence of selling intoxicating liquor contrary to sec. 40 of the Ontario Temperance Act, and the conviction was affirmed by a County Court Judge:—

*Held*, on appeal (by direction of the Attorney-General) to a Divisional Court, that there was no sale.

By the interpretation section of the Act, "sale" includes "exchange, barter, and *traffic*;" but "traffic" as used does not mean "transportation by rail;" it means "the exchange of goods or merchandise for an equivalent."

AN appeal by the defendants from an order of the Judge of the County Court of the County of Simcoe affirming a conviction of the defendants by the Police Magistrate for the Town of Gravenhurst of an offence against the Ontario Temperance Act, sec. 40.

December 3. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

*James Haverson*, K.C., for the appellants, argued that there was no evidence of a sale to warrant a conviction.

*F. P. Brennan*, for the Crown. By cl. (k) of sec. 2 of the Act, "sale" includes "traffic," and there was evidence of traffic, and therefore of sale. There was also evidence of an executory contract of sale: *Rex v. Wright* (1915), 33 O.L.R. 237.

*Haverson*, K.C., in reply, submitted that "sale" means a completed sale, not an executory contract of sale: *Titmus v. Littlewood*, [1916] 1 K.B. 732.

December 16. The judgment of the Court was read by LATCHFORD, C.J.:—This appeal is (by direction of the Attorney-General) from the order of his Honour Judge Vance, Judge of the County Court of the County of Simcoe, of the 11th November, 1924, affirming the conviction of the defendant company by George H. Clarke, Police Magistrate for the Town of Gravenhurst, of the 6th May, 1924.

The information set forth that the defendants on or about the 27th March, 1924, did, at the town of Gravenhurst, sell liquor contrary to the provisions of the Ontario Temperance Act.

To this charge, the defendant company, by counsel, pleaded not guilty. For the prosecution the station-agent of the Canadian National Railway at Gravenhurst produced a way-bill shewing a shipment of fifty cases labelled "O'Keefe's Beverages" from the defendant company to a Mrs. Wasley at Gravenhurst. On the

28th March, the agent telephoned Mrs. Wasley that the goods had arrived, but the lady refused to accept them. The whole shipment was seized next day, while still at the railway station, by the local license inspector, who had two bottles analysed: one was under the  $2\frac{1}{2}$  per cent. allowed to be sold under the Act; the other contained 9.01 per cent. of proof spirit, and had a distinguishing label.

Charles Rennie, a police officer at Gravenhurst, corroborated the evidence of the inspector.

William Fletcher, a grandson of Mrs. Wasley, deposed that he had given an order for beer to the defendants' travelling agent. It was for twenty cases of  $2\frac{1}{2}$  per cent. beer for delivery in May. The order was not acknowledged either orally or in writing. The first knowledge that he and Mrs. Wasley had about the shipment was when they got word from the railway station. They refused the goods. He had discussed the matter with the defendants' representative, who said there had been a mistake in the shipment. It had been sent at the wrong time and too many cases had been shipped.

On cross-examination Fletcher said: "When I ordered the goods I had no guarantee that the order would be accepted by the company. I ordered twenty cases  $2\frac{1}{2}$  per cent. If anything else was sent it was not our order."

It was thus established clearly that, while the order had been for twenty cases of  $2\frac{1}{2}$  per cent., fifty cases had been shipped by mistake and refused as not conforming to the order in two respects, that is, shipped in March, not May, and fifty cases, not twenty. One at least of the cases contained an excess of proof spirit over the quality ordered and beyond that permitted to be sold.

Upon this evidence the magistrate found that the defendants, on or about the 27th March, did, at the town of Gravenhurst, sell liquor contrary to the Act, and imposed a fine of \$750 and costs, and ordered the liquor seized to be forfeited to his Majesty, to be destroyed or otherwise dealt with in such manner as the Minister might direct. No finding of fact was made, and no grounds stated for the conviction.

The defendants appealed to the County Court Judge, on the grounds: (1) that there was no evidence to support the conviction; (2) no evidence of a sale by the defendants; and (3) that, if any sale took place, it took place at Toronto (where the defendants' brewery was), and not at Gravenhurst, and the Police Magistrate for the latter town had no jurisdiction over the offence.

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C.J.

The learned County Court Judge dismissed the appeal without costs. His reasons are briefly expressed. He says:—

“I am satisfied by the evidence upon record that the appellants knew that they were breaking the law in shipping the ale to Gravenhurst. It appears to have been a scheme whereby some legal ale, what is generally called two per cent., was mixed in with the other ale and could be distinguished by the marking on the label, which would be known to the purchaser and perhaps to the consumer in many cases. This being the case, I am satisfied that the Act provides against any technical objections to the style, form, and manner of the conviction. It was said that suspicion is not evidence, which is perfectly correct. The evidence in this case goes beyond a mere suspicion, as the goods were there, and it was shewn that they came from the accused; the accused are primarily the law-breakers, as the Act distinctly prohibits any such action.

“There is ample evidence to support the conviction, and, in my opinion, it was properly made.

“There does not appear to have been any technical objection taken at the trial before the magistrate as to any proceedings in the matter up to that time. In fact it was admitted that the accused shipped the ale in the form in which it was found, but it was done by mistake as was stated.”

What knowledge the appellants may have had that in shipping the liquor they were breaking the law does not appear in the evidence. If they had knowledge—and such knowledge is one of the offences created by the statute—it was not the offence charged against the appellants—not the offence to which the appellants pleaded not guilty, and not the offence of which the appellants were convicted. What that offence was must be clearly had in mind. It is stated with precision in both the information and the conviction. It was not that the shipment or knowledge of the shipment was a breach of the law—if indeed it is such—nor the mixing, whether by mistake or otherwise, in or with the permissible  $2\frac{1}{2}$  per cent. fluid, of a bottle or a case or cases of utterly improper virulence; but that the appellants had *sold* liquor at Gravenhurst in breach of the Act.

The appellants objected, not to the style, form, or manner of the conviction, but to its substance, and what is urged at Bar is simply that there is no evidence to warrant the conviction.

When asked to point to any evidence of such a sale, Mr. Brennan was constrained to admit that there was no evidence of a sale in the ordinary sense of the word. The goods were not the subject of a contract between the appellants and any other

person; they were not sold by the appellants at Gravenhurst or at any other place; they were not purchased by Mrs. Wasley or by any other person at Gravenhurst or elsewhere; there was no sale, no purchase, no delivery, no passing of property to a buyer from a seller.

The only contention lending any support to the conviction was that, as under the interpretation section of the Act "sale" includes "exchange, barter, and traffic," there was evidence of *traffic*: the shipment having been by rail, and "traffic" being a word commonly applied to transportation by rail. That is obviously not the sense in which the word is used in the statute. Having regard to the collocation of "traffic" with "exchange" and "barter," it is plain that the term is employed in its primary and ordinary meaning of trade—"the exchange of goods or merchandise for an equivalent"—a definition recognised in *Goldstein v. Vaughan*, [1897] 1 Q.B. 549.

The conviction is unsupported by any evidence whatever of a sale. The appeal should therefore be allowed and the charge dismissed.

*Appeal allowed.*

[APPELLATE DIVISION.]

BOLAND v. CANADIAN NATIONAL RAILWAY CO.

1925.

*Appeal—Privy Council—Motion to Allow Security—Case not Falling within Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2—No "Sum or Value in Controversy"—Leave to Appeal—No Power in Court to Grant.*

Dec. 11.

Dec. 17.

No appeal lies from a judgment of a Divisional Court of the Appellate Division to his Majesty in his Privy Council unless the case falls within the provisions of the Privy Council Appeals Act, or unless leave to appeal is granted by the Judicial Committee.

The plaintiff proposing to appeal from the judgment in this case (57 O.L.R. 619), it was *held*, upon a motion to allow the security and for leave to appeal, that the sole matter in controversy was the right of the Dominion Railway Board to make an order authorising the expropriation of a portion of the plaintiff's land; that no "sum or value" whatever was "in controversy" (sec. 2); and, the case not falling within the provisions of the Act, the motion must be refused and the plaintiff left to apply to the Judicial Committee for leave to appeal.

*Toussignant v. County of Nicolet* (1902), 32 Can. S.C.R. 353, *City of Toronto v. Toronto Electric Light Co.* (1906), 11 O.L.R. 310, and *Canadian Pacific Railway Co. v. City of Toronto* (1909), 19 O.L.R. 663, followed.

APPLICATION by the plaintiff for an order allowing a bond as security upon the plaintiff's proposed appeal to his Majesty in

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his Privy Council and for leave to appeal from the judgment of the Second Divisional Court of the Appellate Division (57 O.L.R. 619.)

December 10. The application was heard by FERGUSON, J.A., in Chambers.

*J. F. Boland*, for the plaintiff.

*Strachan Johnston*, K.C., for the defendants.

December 11. FERGUSON, J.A.:—No dispute arises as to the sufficiency of the bond. The defendants contend (1) that the amount in controversy does not exceed \$4,000, within the meaning of the Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2. For a reply to that claim the plaintiff relies on an affidavit of Mr. Boland stating that the value of the land in reference to which these proceedings are taken exceeds \$4,000. This statement is not controverted, but Mr. Johnston argues that there is no pecuniary question in issue, and that the questions in issue in this action are the validity of the order of the Railway Board authorising the defendants to expropriate and take possession of the plaintiff's land and the right of the railway company to acquire the land and possession under the relevant statutes, and not the ownership of the land.

The judgment of Mr. Justice Orde which was affirmed by the Divisional Court merely dismisses the plaintiff's claim, and we must therefore look to the pleadings to ascertain what claim was made by the plaintiff.

I incline to the view that the question in issue in this action is the ownership of the land and the right to possession thereof, rather than the way by which the defendants claim title, and that this action falls within *Battle Creek Toasted Corn Flake Co. Ltd. v. Kellogg Toasted Corn Flake Co.* (1923), 54 O.L.R. 629. But, in view of another matter which I have raised and which Mr. Johnston will not waive, I have come to the conclusion that I should refer this whole matter to the full Court; and, therefore, I am not to be taken as expressing a conclusion in reference to the amount in issue, but leave that entirely open for the Court.

Under the Rules of the Privy Council leave to appeal must be obtained from either the Privy Council or the Court appealed from, and I incline to the view that under these Rules I, not being the Court appealed from, cannot grant leave to appeal. As I read the Ontario statute, I am only empowered to allow the security. It is contended that the practice has been for a Judge to allow the security and also grant leave to appeal. I doubt the

right of the Judge to grant leave to appeal. Therefore I refer the whole matter to the full Court.

I think it is only fair that pending the hearing of this application the proceedings on the judgment in the Court below should be stayed. In the *Battle Creek* case the Court was of the opinion that an application for a stay should be made in the Court below. I am not certain that I have power, under these circumstances, to grant a stay, but in so far as I have power I grant the stay.

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December 14. The application was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

*Boland*, for the plaintiff.

*Johnston*, K.C., for the defendants.

December 17. The judgment of the Court was read by MIDDLETON, J.A.:—Motion by the plaintiff for an order approving the security upon a contemplated appeal from the judgment recently delivered by this Court to his Majesty in his Privy Council and for an order giving leave to appeal and technically “allowing the appeal.”

No appeal will lie from the judgment of this Court to his Majesty in his Privy Council unless the case falls within the provisions of the Privy Council Appeals Act, R.S.O. 1914, ch. 54, or unless leave to appeal is granted by the Judicial Committee. It is therefore necessary that it should appear that the case can be brought within the provisions of that statute, which permit an appeal only “where the matter in controversy in any case exceeds the sum or value of \$4,000,” and in certain other cases not now relevant.

In this case the sole matter in controversy is the right of the Railway Board to make an order authorising the expropriation of a portion of the plaintiff’s land. As the result of the expropriation authorised, the value of the land to be taken will be paid to her and she will also be fully compensated for the injurious effect of the taking of this land upon her remaining land. While the matter involved in the litigation is of importance, regard being had to the cases already determined, it cannot be said that there is in controversy any sum or value whatever.

The question of the construction and effect of the statute has arisen in two cases—*City of Toronto v. Toronto Electric Light Co.* (1906), 11 O.L.R. 310, and *Canadian Pacific Railway Co. v. City of Toronto* (1909), 19 O.L.R. 663.

In the earlier case the question was whether two electric light



App. Div. companies had forfeited their right to operate upon the streets of  
 1925. the city of Toronto under an agreement, by reason of their amal-  
 BOLAND gamation. In the later case, the question was the validity of the  
 v. order of the Railway Committee of the Privy Council of Canada  
 CANADIAN requiring the railway company to build a bridge in Toronto. The  
 NATIONAL cost of the bridge would many times exceed the necessary \$4,000,  
 RAILWAY yet it was held that the case did not fall within the statute be-  
 Co. cause the controversy was not as to a pecuniary amount or of a  
 Middleton, pecuniary nature.  
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These cases do not stand alone, but are in accord with the case of *Toussignant v. County of Nicolet* (1902), 32 Can. S.C.R. 353, where the Supreme Court of Canada has similarly construed a similar enactment relating to that Court.

As in the cases referred to, the appellant must be left to apply to the Judicial Committee for leave to appeal.

*Application dismissed with costs.*

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[APPELLATE DIVISION.]

1925.

COMRIE V. FISHER.

Dec. 17.

*Negligence—Motor Vehicles upon Highway—Stationary Vehicle, without Light in Rear, Run into by another Vehicle—Damage to both Vehicles—Claim and Counterclaim in Division Court—Independent Actions—Fault Attributed to Owner of Stationary Vehicle—Appeal—Amount Recovered in Division Court—Set-off.*

The plaintiff's motor vehicle was left standing upon a highway, without a light in the rear, and the defendant's motor vehicle coming from behind ran into the plaintiff's vehicle. Both vehicles were damaged. The plaintiff brought an action in a Division Court and recovered judgment for \$86 and costs. The defendant's counterclaim was dismissed in the Division Court:—

*Held*, upon appeal, that the defendant was not guilty of any negligence, in the circumstances disclosed by the evidence, although he failed to observe the plaintiff's car in time to avoid it; that the defendant was guilty of negligence in leaving his vehicle, unlighted at the rear, on the *via trita*, and, therefore, the defendant's counterclaim should be allowed.

*Empey v. Thurston* (1925), *ante* 168, approved.

The claim and counterclaim being independent, and no appeal from the judgment of the Division Court being competent where the amount involved is less than \$100, the Court could not interfere with the plaintiff's judgment.

A set-off was directed.

AN appeal by the defendant from the judgment of the Ninth Division Court of the County of York in favour of the plaintiff

for the recovery of \$86 damages for negligence, and dismissing the defendant's counterclaim to recover damages by reason of the plaintiff's negligence. Both claim and counterclaim arose out of a collision upon a highway of the motor cars of the plaintiff and defendant.

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December 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

*J. E. Corcoran*, for the appellant, denied that he had been guilty of any negligence at all, and submitted that it had been wholly the plaintiff's fault that the accident had occurred. But, if the defendant were guilty of any negligence, then the Contributory Negligence Act, 1924, should apply, and the amount of the respective damages should be added together and divided by two, and the one set off against the other.

*E. A. Richardson*, for the plaintiff, respondent, contended, in the first place, that no appeal could be taken against the judgment pronounced in favour of the plaintiff in the action itself, as the amount of the judgment was under \$100. As to the counterclaim, it was rightly dismissed on the finding of the defendant's ultimate negligence.

December 17. The judgment of the Court was read by MASTEN, J.A.:—Appeal from the judgment of O'Connell, County Court Judge of York, dated the 24th October, 1925, whereby he awarded to the plaintiff \$86 damages and dismissed the defendant's counterclaim, both with costs.

Upon further consideration of all the evidence and of the arguments of counsel, the Court arrives unanimously at the conclusion that the defendant was not guilty of any negligence in the circumstances here disclosed; that the plaintiff was guilty of negligence in leaving his motor car on the *via trita*; particularly when it was unlighted at the rear, where the collision took place. The undisputed facts are: that the night was dark and murky, the driving difficult and slippery; that, in consequence, the defendant was driving east on the south side of the Kingston road, with his right hand wheel well over on the dirt to the south of the pavement; that there was a glare from an approaching trolley car going west; and that, suddenly seeing several men on foot in his pathway directly in front of him, he swerved to the north to avoid injuring them, and so collided with the plaintiff's car, which was some distance over on the pavement, where it had no right to be.

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We are unable to agree with the trial Judge that in these circumstances the defendant was guilty of negligence because he failed to observe the plaintiff's car in time to avoid it.

The result is that the defendant's counterclaim for \$120 must be allowed with costs here and below. The plaintiff's judgment for \$86 and costs we cannot interfere with. It is *res judicata*, and no right of appeal from it is given, the claim and counterclaim being for that purpose independent actions.

The circumstances of the present case bear a remarkable similarity to the circumstances in the case of *Empey v. Thurston* (1925), *ante* 168, and our view accords with that of the Chief Justice of the Common Pleas as there expressed so far as the two cases raise the same questions.

The result is that the plaintiff holds his judgment recovered in the Division Court for \$86 and costs in that Court. The defendant recovers \$120, with costs of this appeal and below, and the two judgments so recovered will be set off against each other.

*Judgment accordingly.*

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[APPELLATE DIVISION.]

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## RE BLOOR STREET WIDENING.

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*Municipal Corporations—By-law Authorising Widening of Street—Consolidated Municipal Act, 1922, sec. 325a—Repeal—Leave of Ontario Railway and Municipal Board—Amending Act, 1924, 14 Geo. V. ch. 53, sec. 4—Retroactivity—"Deferred" By-law—Change in Measure of Compensation to be Made to Landowners—"Exceptional Reasons"—Right of Appeal from Decision of Board—Existence of, where Jurisdiction Conferred upon Board by Statute other than Ontario Railway and Municipal Board Act—Whether Question Decided by Board one of Jurisdiction or Law (sec. 48(1)).*

By sec. 325a of the Consolidated Municipal Act, 1922, the Legislature empowered the council of a city to pass a by-law for (*inter alia*) the widening of a highway; the operation of the by-law, by the actual construction of the work, to be deferred until a day, to be named in the by-law, not less than three nor more than ten years after the date of the passing of the by-law. By subsec. 3, the by-law "shall be binding upon the corporation and shall not be repealed or altered except by a vote of two-thirds of the members of the council and with leave of the Municipal Board; such leave to be granted the corporation only for exceptional reasons not apparent or existing when the by-law was passed," etc. By other subsections, the compensation to be paid to landowners was limited to (a) the market value of the lands exclusive of buildings and improvements, to be fixed as of the date of the registration of the draft plan or the date

of the passing of the by-law, and (b) the value of the buildings and improvements to be determined as of the date of the actual taking. Acting upon this section (325a), the council of the city of T., shortly after the 18th May, 1922, upon which day sec. 325a became operative, passed a by-law for the widening of a street, and fixing a date in 1926, three and one half years after its passing, as the date when possession of the lands necessary for the widening was to be taken. In 1924, sec. 325a was amended by the Legislature (14 Geo. V. ch. 53, sec. 4) by adding to the clauses relating to the damages payable by the municipality two heads, damages occasioned by disturbance to business and damages by injurious affection of other lands, buildings, etc. By subsec. 5 of this sec. 4 it was provided that sec. 4 should be read as though it had been in force from and after the 18th May, 1922. The Municipal Board granted leave to pass a repealing by-law, upon the ground that the liability of the city corporation had been increased by the amendment to the statute and that the change was "an exceptional reason not apparent or existing when the by-law was passed." No repealing by-law having been passed, certain rate-payers applied to a Divisional Court for leave to appeal from the decision of the Board. The Court which heard the application gave leave to appeal, holding that an appeal lay from the decision of the Board upon a question of jurisdiction, or upon any question of law, not only in respect of matters in which jurisdiction was conferred upon the Board by the Ontario Railway and Municipal Board Act, but in all matters in which jurisdiction is conferred upon it by any other general or special Act:—

*Held*, by the Divisional Court which heard the appeal brought on pursuant to the leave granted, that the decision of this point upon the earlier hearing was conclusive; but that the question whether the appeal raised a question of jurisdiction or of law (sec. 48(1) of the Ontario Railway and Municipal Board Act) was open; and *held*, by the majority of the Court, that, if the existence of exceptional reasons was a question of fact, it was a question of fact essential to the finding of jurisdiction, and as such was properly a subject-matter of appeal; but actually the whole question was one of law—the true construction and effect of the amending enactment and of subsec. 3 of sec. 325a of the Consolidated Municipal Act, 1922.

Upon the merits, it was *held*, by the majority, that the change made in 1924 was general and applicable to all municipalities and to all by-laws passed under sec. 325a, and so could not be regarded as exceptional; and that the clause of the amending Act which provided that the amending provision should be read as if it had been in effect from and after the 18th May, 1922, compelled the Court to read sec. 325a as though the amending provision had always been embodied in it.

*Hudson's Bay Co. v. Bratt's Lake Rural Municipality*, [1919] A.C. 1006, referred to as to the meaning of "exceptional."

The intention of the Legislature in enacting sec. 325a was probably to give a municipal council power to pass "deferred" by-laws, but it was not its intention to interfere with the landowners' rights as to compensation; and so it was made plain by the amendment of 1924 that the legislative will had always been that "the general principles of compensation" should apply in the case of such deferred by-laws.

*Per HOGGINS, J.A. (dissenting):*—The decision of the Board involved a question rather of mixed fact and law than one of law alone, and no appeal lay. But, if an appeal did lie, the Board was right in holding that a serious burden had been imposed upon the city corporation by the amendment of 1924, and that was an "exceptional reason" justifying the repeal of the by-law.

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APPEAL by J. Wood and Union Investments Ltd., two rate-payers of the City of Toronto, from an order of the Ontario Railway and Municipal Board, made on the 21st May, 1925, giving leave to the city council to repeal by-law No. 9416, intituled "A By-law to authorise the Widening of Bloor Street from Sherbourne Street to Spadina Road and to take the Land necessary therefor."

October 19 and 20. The appeal was heard by MAGEE, HODGINS, MIDDLETON, FERGUSON, and SMITH, JJ.A.

W. N. *Tilley*, K.C., for the appellants, contended that the Ontario Railway and Municipal Board erred in granting leave to the city council to repeal by-law 9416. He pointed out that, under sec. 325a (3) of the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, such leave can be granted "only for exceptional reasons not apparent or existing when the by-law was passed," and argued that no such "exceptional reasons" existed in this case. He further contended that the Second Divisional Court, in giving leave to appeal, had decided that the question of what constituted "exceptional reasons" was one of law, and not of fact, and that the decision was binding on this Court. Section 4 of the Municipal Amendment Act, 1924, 14 Geo. V. ch. 53, did not make such a change in the basis of compensation as to constitute the "exceptional reasons" required by the Act of 1922. An owner, or tenant in possession, of business premises has always been entitled to compensation for disturbance to his business, by reason of expropriation proceedings, if he can prove that the premises are of special value to him for his business. Clause (c) of subsec. 2 of sec. 4 of the Act of 1924 does not extend this right; it is merely a clause of limitation, and was not intended to increase the amount of compensation. The Act of 1924 was passed before any by-law under sec. 325a of the Act of 1922 could become operative. The board overlooked the fact that subsec. 5 of sec. 4 of the Act of 1924 provides that the entire section shall be read as though it had been in effect from and after the 18th day of May, 1922, which was before the passing of the Act of 1922, and that, consequently, it could give rise to no "exceptional reasons not apparent or existing when the by-law was passed." The Railway Board cannot say that what the Legislature has done is "exceptional;" if the Legislature had intended to create "exceptional reasons" in the Act of 1924, it might have said that any by-law heretofore passed might be repealed. The Board approached the consideration of the Act of 1924 in the attitude that the Legislature's intention was to

make a change in the law; the Board should not have so done. The "exceptional reasons" for giving leave to repeal a by-law must not be mere general changes in the law; they must be reasons exceptional to the particular by-law and not merely to by-laws generally. Reference to *Re Powell and City of Toronto* (1925), 56 O.L.R. 541; *Ouellette v. Canadian Pacific Railway Co.*, [1925] A.C. 569; *Pastoral Finance Association Ltd. v. The Minister*, [1914] A.C. 1083; *Dodge v. The King* (1906), 38 Can. S.C.R. 149; *Re Dixon and City of Toronto* (1924), 56 O.L.R. 167; *Re Letros and City of Toronto* (1924), 56 O.L.R. 175; *Re Meyer and City of Toronto* (1914), 30 O.L.R. 426; *Hudson's Bay Co. v. Bratt's Lake Rural Municipality*, [1919] A.C. 1006.

G. R. Geary, K.C., for the Municipal Corporation of the City of Toronto, the respondents, argued that the question whether or not there were "exceptional reasons" within the meaning of the Consolidated Municipal Act, 1922, was a matter of fact to be decided by the Board, and the Board's decision could not be reviewed by this Court. He further argued that the Board is not a court and has no jurisdiction to give an academic construction to a statute; that the Board may only construe incidentally in the exercise of its powers. The Board, in this case, is not functioning under its general jurisdiction as the Railway and Municipal Board, but rather as *persona designata* under the Consolidated Municipal Act, and there is no appeal from a decision of the Board acting in this capacity. If there is a right of appeal, then the Board was right in deciding that the Act of 1924 created "exceptional reasons," within the meaning of the Act of 1922. Under the Act of 1922 there was no compensation payable for business disturbance. This added burden was thrown on the city corporation by the 1924 amendment. Reference to *Re Powell and City of Toronto*, 56 O.L.R. 541; *Re Town of Sandwich and Sandwich Windsor and Amherstburg Railway Co.* (1910), 2 O.W.N. 93; *Re Toronto Railway Co. and City of Toronto* (1918), 44 O.L.R. 381; *Hagmaier v. Willesden Overseers*, [1904] 2 K.B. 316; *Smith v. Chorley District Council*, [1897] 1 Q.B. 532; *Commissioners of Inland Revenue v. Glasgow and South-Western Railway Co.* (1887), 12 App. Cas. 315.

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December 21. MIDDLETON, J.A.:—Appeal by two ratepayers, by leave of the Second Divisional Court, granted on the 1st June, 1925, from the order of the Ontario Railway and Municipal Board pronounced on the 21st May, 1925, permitting the Corporation of the City of Toronto to pass a by-law repealing by-law number 9416, passed in pursuance of sec. 325a of the Consolidated Muni-

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icipal Act, 1922, upon terms fully set forth in the order, viz., payment of damages to be ascertained by three arbitrators in the manner provided by sec. 325*a* and revesting of the lands free from the operation of the by-law in the owners.

By an amendment to the Municipal Act, R.S.O. 1914, ch. 192, passed in 1922, 12 & 13 Geo. V. ch. 71, sec. 12,\* and becoming operative on the 18th May, 1922, the Legislature empowered the council of a city having a population of not less than 50,000, and certain other municipalities, to pass by-laws for establishing, laying out, extending, widening, or diverting a highway; the operation of the by-law, by the actual construction of the work, to be deferred until a day, to be named in the by-law, not less than three nor more than ten years after the date of the passing of the by-law.

Upon the passing of the by-law, the land required to be taken for the work is deemed to be vested in the corporation, subject to the right of the owner to remain in possession until entry by the municipality (subsec. 5); compensation is to be paid on the day fixed by the by-law for entry (subsec. 9); this compensation to be ascertained and determined and limited to (a) the market value of the land exclusive of buildings and improvements (subsec. 10); the value of the land to be fixed as of the date of the registration of the draft plan or of the date of the passing of the by-law (subsec. 11 (c)); and (b) the value of the buildings and improvements to be determined as of the date of the actual taking (subsec. 12(a)).

By subsec. 3, the by-law "shall be binding upon the corporation and shall not be repealed or altered except by a vote of two-thirds of the members of the council and with leave of the Municipal Board; such leave to be granted the corporation only for exceptional reasons not apparent or existing when the by-law was passed and after hearing the owners of the land proposed to be taken, and on such terms as the Board may determine," etc.

The section contains many other provisions which I do not think need now be referred to.

Acting upon this statute and in reliance upon its provisions, the council passed the by-law in question shortly after the Act became operative, providing for the widening of Bloor street between Sherbourne street and Spadina avenue, and fixing a date in 1926, three and one half years after its passing, as the date when possession was to be taken.

A ratepayer was advised, rightly or wrongly, that the effect

\* This amendment is incorporated in the Consolidated Municipal Act, 1922, as sec. 325*a*.

of this legislation was to give to those whose land was being taken a narrower and smaller right of compensation than they would have possessed had a by-law been passed under the provisions of the Municipal Act as it stood before the amendment, and that the effect of the amendment was not merely to give to the municipality the right to defer the street widening, but to relieve it from some part of the compensation that would be otherwise payable. With this in mind, the attention of the Legislature was drawn to the situation, and an amending Act was passed in 1924, 14 Geo. V. ch. 53—sec. 4 of which amends the Act by adding to the clauses relating to the damages payable by the municipality two headings: “(c) damages occasioned by disturbance to any business established previous to the passing of the by-law to which the general principles of compensation shall apply;” and “(d) damages to land, buildings and improvements injuriously affected by the exercise of any of the powers conferred by this section.” Other amendments were made ancillary to these changes, and by subsec. 5 of sec. 4 of this amending Act it was provided that “this section shall be read as though it had been in effect and force from and after the 18th day of May, 1922.”

The amendment in clause (c) is the only one of importance, the provision of clause (d) being probably covered by a provision already in the statute which is struck out by the fourth clause of the amending Act.

Considerable argument took place before us as to the real effect of the introduction of clause (c). Mr. Tilley suggests that the effect of it is not to increase the landowners' right to compensation, but rather to diminish it, because, in his view, under the statute as it stood before amendment, there would be a right to compensation for the loss occasioned by business disturbance, the amount of the compensation to be ascertained as of the date when possession would be taken under the by-law. Mr. Geary, on the other hand, contends that under the decision of the Divisional Court in *Re Powell and City of Toronto*, 56 O.L.R. 541, there is no right to any compensation with respect to business loss—rather ignoring the earlier decisions that the value to the owner of the land taken is to be determined in the light of the particular use he is making of it, a thing which is quite distinct from general business losses.

It would be manifestly most inexpedient to enter upon a discussion of the effect, or absence of effect, of the provision in question, in the absence of the landowners vitally concerned. I shall content myself with saying that the municipal council of the city

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has been advised, and in good faith believes, that the effect of the legislation is largely to increase the municipality's liability for compensation.

An application for leave to repeal was made to the Municipal Board, the sole reason relied upon being the change by reason of the Act of 1924 of the measure of compensation to be paid; and the Board, being of opinion that the liability of the city corporation had been increased, regarded this change in the law as "an exceptional reason not apparent or existing when the by-law was passed," justifying the granting of leave to pass a repealing by-law. No repealing by-law has yet been passed.

Upon the motion for leave to appeal it was contended that no appeal would lie from the decision of the Board, because this matter did not come within the exercise of its ordinary jurisdiction conferred by its constituting statute, R.S.O. 1914, ch. 186, but it acted as a body designated under this special section of the Municipal Act. The Court hearing that application came to the conclusion that an appeal would lie from the Board to the Divisional Court upon a question of jurisdiction, or upon any question of law, not only in respect of matters in which jurisdiction was conferred upon it by the Ontario Railway and Municipal Board Act, but in all matters in which jurisdiction is conferred upon it by any other general or special Act. An attempt was made to reargue this question before this Court, but the decision upon the earlier hearing upon this question is conclusive.

An appeal can be had only upon a question of jurisdiction, or on any question of law (sec. 48(1) of the Ontario Railway and Municipal Board Act), and in granting leave it was intended to reserve to the Court hearing the appeal power to determine whether the question raised by the appeal came within these words, and it is now argued that the appeal does not raise either a question of jurisdiction or of law.

It is, I think, plain that the question argued is both a question of jurisdiction and of law. The Municipal Board has no power or jurisdiction to grant leave to repeal save for exceptional reasons not apparent or existing when the by-law was passed. If the existence of such reasons is a question of fact, then it is a question of fact essential to the finding of jurisdiction, and as such it properly forms a subject-matter of appeal. It is, however, in my view, here not a question of fact to be determined upon the evidence, but a question of law. I do not wish to be understood as saying that every finding by the Board of an exceptional reason is a finding upon a question of law. It may possibly be upon a question of fact, but here the sole question is one of law—

the true construction and effect of the amending Act and of subsec. 3 of sec. 325a of the Act of 1922.

Mr. Tilley argues that the Board erred in its decision, for three reasons: first, because there was in fact no change in the law, or at any rate no change prejudicial to the municipality; secondly, that the change, if any, was one which was general and applicable to all municipalities and to all by-laws passed under this statute, and so cannot be regarded as exceptional; and, thirdly, that the clause of the amending Act which provides that this section shall be read as if it had been in effect from and after the 18th day of May, 1922, the day upon which the original statute became operative, compels the Court to read this law as though the amending provisions had always been embodied in the statute. I have already emphasised the undesirability of discussing the first suggestion; and, in my view, it is unnecessary to do so, for I am of opinion that Mr. Tilley is right in both of his other contentions. The meaning of the word "exceptional" was discussed by the Privy Council in the case of *Hudson's Bay Co. v. Bratt's Lake Rural Municipality*, [1919] A.C. 1006. There the company was free from any "exceptional" taxation. A taxing Act subsequently imposed a liability upon owners holding more than a certain quantity of land. It was suggested that this company alone would fall within the ambit of the Act, but this did not make it "exceptional" taxation, for the statute was general in its operation and applied to all when once its provisions were complied with.

Furthermore, while accepting Mr. Geary's contention that the Court ought not to give a retroactive effect to a statute unless it is plainly the intention of the Legislature that retroactive effect should be given, I can imagine no plainer intimation of the legislative will than the words found in the section in question. I can well understand why the Legislature would direct the amendment to be retroactive. Its intention in passing the Act of 1922 was probably to give to the municipality power to pass "deferred" by-laws, but it was not its intention to interfere with the landowners' rights as to compensation; and so, upon attention being drawn to a possible effect of the Act, it was made plain that the legislative will had always been that "the general principles of compensation" should apply in the case of such deferred by-laws.

If in passing the by-law in 1922, the city corporation's advisers really thought that the Act as it then stood did not impose any liability in respect to business losses, there is an element of hardship in holding it to a by-law passed upon this erroneous as-

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sumption; and when, in 1924, the Legislature amended the statute, it might well have listened to an application on the part of the municipality for leave to repeal the then existing by-law. But this Court has no authority to supplement the legislation, and there is nothing to prevent resort being had to the Legislature if a proper case can be made. As to this I say nothing, as I am by no means satisfied as to the facts.

The appeal should be allowed, and I see no reason why the costs here and below should not follow the event.

MAGEE, FERGUSON, and SMITH, JJ.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—Appeal by leave of the Second Divisional Court from the decision of the Ontario Railway and Municipal Board.

I think this involves a question rather of mixed fact and law than one of law alone. The statute in question must, of course, be construed by the Board in order to understand its effect. But, having done this, the Board must decide whether its incidence upon the situation before it, and on the interests of the several parties, is in any way substantial, and if so whether, in its judgment, it thus forms an “exceptional reason” within the meaning of the statute of Ontario, 1924, ch. 53, sec. 4. These two latter inquiries involve, I think, questions of fact, and so the appeal is one not of pure law. The Second Divisional Court gave leave, subject to this point, which was left open. In my judgment, no appeal lies in this case. The Board is not given jurisdiction by the existence of “exceptional reasons” or by its finding that such reasons exist, but general jurisdiction is conferred by the statute over the subject-matter. It is true that its approval is only to be given for “exceptional reasons,” and if in its judgment such reasons do not exist, it may refuse approval; but approval or disapproval does not depend on what this or any other Court may think of the sufficiency of the reasons—it depends on the discretion and view of the Board.

If, however, an appeal lies, then I think that the Board was right in holding that a serious burden had been imposed on the city in 1924. It was not there in 1922, nor until the later statute put it there; and, while it is to operate now as if it had been in effect in 1922, there is no getting away from the fact that from the 19th May, 1922, to the 28th November, 1922 (when the by-law was passed), and from then till the 17th April, 1924, it had no existence. On the main question I am of the



clear opinion that damages for disturbance of business in the 1924 statute, while it may be intended to be something similar to the element of usefulness and profitableness for which compensation may be had, as part of the value to the owner of land and buildings, yet is manifestly a burden added to the compensation provided for in 1922. In 1922 the land and buildings were to be valued separately (see subsecs. 10 and 11(a)). Besides this, subsec. 11(c) and subsec. 12 shew that the land and buildings are to be dealt with on different dates and under different circumstances. This, coupled with subsec. 11(b), indicates that such a matter as "disturbance," i.e., loss of profits (*Lord Watson in Edinburgh Street Tramways Co. v. Lord Provost etc. of Edinburgh*, [1894] A.C. 456, at p. 476), which is an element appreciating the value to the owner of the land and buildings together, is not provided for. The provisions to be found providing for special cases do not in any way deal with the disturbance and loss of profits as included in the compensation, while sec. 12(a), affording compensation for injurious affection, excludes buildings from its purview. This last provision is by the 1924 statute applied to land, buildings, and improvements, instead of to land as defined by subsec. 1. The words "disturbance of business," however, may cover many elements of loss or damage quite outside the element of profitableness which is usually included for the purpose of settling the value to the owner of used land and buildings. See Cripps on Compensation, 6th ed., p. 116.

Apart from this, we are, by sec. 32 of the Judicature Act, precluded from holding that disturbance of business, under conditions similar to those arising in the carrying out of the by-law, can be recovered, by reason of the judgment in *Re Powell and City of Toronto*, 56 O.L.R. 541, which was decided by the Second Divisional Court.

I agree that it is an unusual proceeding to decide, in the absence of the ratepayers immediately affected, as to the compensation which they may be entitled to get under the present or past legislation. But I fail to see how it can be avoided. If we merely say we do not know or do not inquire what the difference between the two statutes is, or what is the result of the amendments, then we in effect decide that there is no exceptional reason, because we have not inquired and so have not found one, and that the Board is wrong because we cannot say that it is right. The Board puts its judgment upon intelligible grounds, thus:—

"The Board can imagine few things more exceptional than the use of the compulsory powers of the law-making authority to impose upon a contracting party a new and undefined obliga-

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tion—for the obligation of the City of Toronto under by-law No. 9416 is of the nature of an obligation in contract.”

I cannot conceive of any exceptional reason more serious than the changing by the Legislature of the entire basis upon which a far-reaching and expensive street improvement, involving the payment of large damages, has been come to. The fact that the Assessment Commissioner may have reported figures based upon what he wrongly thought the law allowed is entirely beside the mark. Those figures were only estimates and bound nobody, and the real amount to be shouldered and divided by the ratepayers in general and the property-owners must depend, not on these estimates, but upon what the law would find was the legal right or liability of the respective parties.

Nor am I able to agree to the argument that the case of *Hudson's Bay Co. v. Bratt's Lake Rural Municipality*, [1919] A.C. 1006, settles the matter. The Judicial Committee were there deciding what was an “exceptional tax” on land, and they necessarily construed the word “exceptional” as applied to systems of taxation, and having regard to the nature and incidence of taxes generally. But I would be very loath to hold that because the Lords of the Privy Council had adjudged what an “exceptional tax” in a particular statute meant, they had also decided that exceptional reasons in relation to municipal street widenings and improvements generally, where local and municipal considerations must be regarded, were to be treated as if they had to be measured and classified according to the rules applicable to scientific or constitutional taxation. There is no inflexible meaning to the word “exceptional.” It may be read as meaning “special” just as well as “unusual” or “unequal,” or as importing something not general in its application. As applied to reasons which appeal to a judicial body, its scope is very wide. To decide otherwise would transfer to this Court the right to substitute its views and reasons for those of the Board, to which the Legislature has expressly committed this very important discretion, without even the excuse that we differed from the conclusion to which the Board had come as to the effect of the 1924 statute.

I would dismiss the appeal.

*Appeal allowed (HODGINS, J.A., dissenting).*

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## [APPELLATE DIVISION.]

CLARKSON v. SMITH &amp; GOLDBERG.

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*Set-off—Debt Owed by Partnership to Bank—Joint Indebtedness of Partners—Moneys in Bank to Credit of Individual Partner—Hypothecation to Bank as Security for Joint Indebtedness—Equitable Considerations—Effect of Failure of Bank.*

A partner, who, with his co-partner, was sued by the liquidators of an insolvent bank for a partnership debt for which he had pledged his individual deposit in the bank, was *held* entitled to have his separate deposit applied, either as a set-off in the action, or against the partnership debt.

*Ex p. Hanson* (1806-11), 12 Ves. 346, 18 Ves. 232, applied and followed. The bank had not destroyed the security. The law had stepped in so as to require its assets to be divided among its creditors; but the equity applied in favour of the partner arose from all the circumstances existing in the case, of which the bank's failure was only one. Judgment of MIDDLETON, J.A., 57 O.L.R. 251 affirmed.

APPEAL by the plaintiffs from the judgment of MIDDLETON, J.A., 57 O.L.R. 251.

October 9. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

*R. C. H. Cassels*, K.C., for the appellants, argued that the defendants were not entitled to set off against the appellants' claim on an overdraft by the firm of Smith & Goldberg to the bank, which was a joint indebtedness, the amount of the defendant Smith's cheque for \$3,000 drawn against his personal account with the bank, which was a separate indebtedness of the bank to him: *Watts v. Christie* (1849), 11 Beav. 546; *Ex p. Caldicott* (1884), 25 Ch. D. 716. The defendants had no right to appropriate to the overdraft the funds represented by the cheque until default had been made by the firm in the payment of their obligations to the bank, and the firm did not at any time make default in the payment of such obligations. Only when the debt of the firm to the bank should be paid in full would Smith's rights revive, and the bank's failure in the meantime made no difference.

*H. S. White*, K.C., for the defendants, respondents, did not dispute the general proposition that the joint indebtedness of the firm to the bank could not be set off against the separate indebtedness of the bank to one of the joint creditors, but he contended that the hypothecation of the amount standing to the credit of Smith as security for the indebtedness of the firm to the bank took the case out of the general rule, and entitled Smith to have the

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amount standing to his credit deducted from the amount for which he was liable: *Ex p. Hanson* (1806-11), 12 Ves. 346, 18 Ves. 232; *James v. Kynnier* (1799), 5 Ves. 108; *Clarkson v. Robinet* (1924), 27 O.W.N. 346. He also urged that the bank's refusal to honour Smith's cheques amounted to an appropriation by the bank of \$3,000 of his bank-account to the firm's indebtedness to the bank.

December 21. The judgment of the Court was read by HODGINS, J.A.:—Appeal from the judgment of Middleton, J.A., reversing a judgment of the Master of the Supreme Court, to whom the action was referred for trial.

The question involved is whether a partner, who, with his co-partner, is sued by the liquidators of the Home Bank of Canada for a partnership debt for which he has pledged his individual deposit in the bank, is entitled to have his separate deposit applied, either as a set-off in the action or after judgment, against the partnership debt. The Master thought he was not. The learned Judge reversed his finding.

The hypothecation agreement provided that the securities and proceeds were to be held by the bank "as a general and continuing collateral security for payment of the present and future indebtedness and liability of the undersigned, and any ultimate unpaid balance thereof, and the same may be realised by the bank in such manner as may seem to it advisable, and without notice to the undersigned, in the event of any default in such payment. The said proceeds may be held in lieu of what is realised, and may, as and when the bank thinks fit, be appropriated on account of such parts of said indebtedness and liability as to the bank seems best. . . . The claims of the undersigned against any party on whom any of the foregoing bills are drawn, and in respect of which the bills are intended to be drawn, are hereby assigned to the bank."

With this was given a cheque for \$3,000 dated the 31st March, 1923, on the partner's savings account, payable to the bank.

The bank has no true lien upon deposits in its hands, as pointed out in *Royal Trust Co. v. Molsons Bank* (1912), 27 O.L.R. 441, but by the hypothecation agreement the debt of the bank to the partner for his deposit was in effect assigned to the bank. The cheque is a bill of exchange payable on demand, and so was a security to be held on the terms of the pledge.

Under these circumstances, the right to appropriate the security or to set off the debt was, while the bank was a going concern, a matter in the discretion of the bank, which could sue

the firm without doing either. The right of set-off does not under ordinary circumstances exist between the debt due by a firm and an amount due to a separate partner, nor do I see that the sections of the Winding-up Act and of the Bankruptcy Act regarding set-off aid in the matter.

The refusal of the bank to allow the partner to draw cheques against his deposit cannot be regarded as an actual appropriation. It was in effect an insistence on the situation remaining *in statu quo*.

But "equitable set-off . . . arises where there are certain equitable circumstances which give a right to the person who sets them up against his opponent:" *per* Fry, J., in *In re West of England and South Wales District Bank* (1879), 27 W.R. 646, 647, and 40 L.T.R. 652, 654.

This action is one taken by the liquidators in the Winding-up to realise the assets of the bank. In it they have sued the partners in such a way (i.e., A. and B., trading as A. & B. Co.) that when the judgment is recovered the joint debt will become a judgment debt which may be levied against the firm assets or against those of each partner singly: *Re McDonagh and Jephson* (1889), 16 A.R. 107; Lindley on Partnership, 9th ed., p. 382. The bank having thus chosen to create a situation by which the surety could be required severally to pay the whole firm debt out of his personal assets, while refusing him the right to use his deposit for that purpose, I think there are shewn equitable circumstances sufficient to warrant a court of equity in interposing to prevent a manifest injustice. The enforcement of this judgment against the property of the defendant Smith individually, or against the firm assets in which he has an interest as partner, would at once entitle him to have his deposit applied on the firm's indebtedness for which it was security. There is no reason why this right cannot now be recognised and given effect to without waiting till after judgment is recovered.

The situation arising in this case seems to me to be much on a par with that in *Ex p. Hanson* (1806), 12 Ves. 346, where Lord Chancellor Erskine said:—

"But in this case I am not obliged to do more than courts of equity were in the habit of doing, before the Statute of Set-off existed; which statute was made only to prevent circuitry. Suppose the bankruptcy had not occurred. A plea of set-off could not have been put in to an action by the bankers: but the moment they obtained judgment Hanson would have brought an action; and, if the surety had paid the joint debt, would have repaid him by the money recovered in that action; if Hanson

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 1925, if they had paid in moieties, they would have divided it. So the  
 ——— thing would have been just as if no action had been brought.”

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Upon that statement he allowed a set-off in the action itself, and gave leave to prove against the bankers' estate for the residue.

In the later stages of *Ex p. Hanson*, Lord Eldon, then Lord Chancellor, in approving the judgment, emphasised his agreement with Lord Erskine by pointing out that it gave effect to the equitable rights of a surety in such a case (18 Ves. at pp. 233, 234).

The failure of this bank, which made it unable to account for the security deposited with it, is an added reason for holding it strictly to the form of its proceedings and their consequences. Otherwise its insolvency, though it put an end to its right to exercise a discretion adversely to the surety's claim, makes no difference in the result. I do not agree that the bank has destroyed the security. The law has stepped in so as to require its assets to be divided among its creditors; but this equity arises from all the circumstances existing in this case, of which the bank's failure is only one: *Barrett's Case* (1865), 4 DeG. J. & S. 756, approved in *Re Central Bank of Canada*, *Yorke's Case* (1888), 15 O.R. 625. See also *Moody v. Canadian Bank of Commerce* (1891), 14 P.R. 258.

I would dismiss the appeal with costs.

MULOCK, C.J.O., MAGEE and SMITH, J.J.A., agreed with HODGINS, J.A.

FERGUSON, J.A., agreed in the result.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

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GREAT LAKES STEAMSHIP CO. v. MAPLE LEAF MILLING CO. LTD.

June 12.  
 Dec. 21.

*Damages—Injury to Ship—Moneys Expended in Repair—Interest—  
 “Damage to the Steamer”—Breach of Contract—Damages Ascer-  
 tained upon Reference—Interest from Date of Report only.*

By the judgment in this action it was declared that the plaintiff was entitled to recover from the defendant the damage to a certain ship sustained by an accident on a certain day, and a reference to the Master to inquire and state the damages was directed. The Master

found that the damage to the ship sustained by the accident amounted to the sum of \$38,547.86, and refused to allow interest on the amount expended in repairs:—

*Held*, that he was right.

The majority of the Court was of opinion that the language of the judgment limited the amount recoverable to the amount of actual damage to the ship, and interest on the amount expended in repairs was not damage to the ship.

*Per* HODGINS, J.A.:—The breach of contract in not lightering the vessel was the immediate cause of the damage, as held by the Judicial Committee ([1924] 4 D.L.R. 1101, 1106), and the case must be determined on the principles applicable to breaches of contract where the damages are not ascertainable by mere computation, or where it cannot be said that payment of a just debt has been improperly withheld; and, where the amount payable is in the nature of damages which require an investigation in order to fix the amount, interest does not begin to run until the amount of damages has been ascertained: *Bradley v. Bailey and Jasperson* (1923), 52 O.L.R. 435; *McLean v. Canadian Pacific Railway Co.* (1923), 53 O.L.R. 523. To decide otherwise would be to give compensation for the time occupied in ascertaining the damages.

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AN appeal by the plaintiff company from the report of the Master of the Supreme Court upon a reference to him to inquire and state the damages to which the plaintiff company was entitled in respect of damage to a boat owned by it.

June 11. The appeal was heard by RIDDELL, J., in the Weekly Court, Toronto.

*Gideon Grant*, K.C., for the plaintiff company.

*F. H. Phippen*, K.C., for the defendant company.

June 12. RIDDELL, J.:—This is an action brought for damages occasioned by the negligence of the defendant company which brought about an injury to the plaintiff company's boat, and it was referred to the learned Master to determine the amount of damages.

It appeared that a considerable amount of money was paid by the plaintiff company for the repair of the boat, and this appeal is substantially based upon the proposition that interest should be allowed upon that amount by the Master in fixing the damages.

The first point that is made is that the rule in the Admiralty Court should be followed. But it is clearly pointed out in *The Gertrude* (1888), 13 P.D. 105, that where an action is brought in a common law court, notwithstanding that it might have been brought in the Admiralty Court, the common law rule and not the Admiralty rule must be applied, even although, as was thought by Lord Esher, M.R., at p. 108, the Admiralty rule is more just than the common law rule. I can find no error in the Master's ruling in that regard.

Riddell, J. In other respects, whatever might have been the finding, were  
 1925. the case of first instance, I think the learned Master was right  
 in holding that he was bound, and I think I am bound, by the  
 GREAT case of *Bradley v. Bailey and Jasperson* (1923), 52 O.L.R. 435.  
 LAKES I think the appeal must be dismissed and with costs.  
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The plaintiff company appealed from the order of RIDDELL, J.

November 6. The appeal was heard by MULOCK, C.J.O.,  
 MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

*P. E. F. Smily*, for the appellant company, contended that it was entitled to recover interest on the amount paid to repair the damage to the ship, from the date of such payment. This was a case where a jury would have allowed interest as damages, under sec. 34(5) of the Judicature Act. Since the respondent company had withheld payment of a just debt owed to the appellant company, the Court could award interest by way of compensation. The respondent company became aware of the amount paid by the appellant company for repairs, immediately after such payment, and there was a duty on the respondent company to reimburse the appellant company at once. The rule of the Admiralty Court applies to this case, and, under that rule, interest should be awarded. Reference to *Rowan v. Toronto Railway Co.* (1918), 43 O.L.R. 164; *McLean v. Canadian Pacific Railway Co.* (1923), 53 O.L.R. 533; *Bradley v. Bailey and Jasperson*, 52 O.L.R. 435; *Bateman and Matthews v. Spencer*, [1923] 4 D.L.R. 170; *Toronto Railway Co. v. Toronto Corporation*, [1906] A.C. 117; *British Columbia Saw-Mill Co. v. Nettleship* (1868), L.R. 3 C.P. 499.

*H. J. Scott*, K.C., for the respondent company, argued that the rule of the Admiralty Court was not applicable. The action was brought in the Supreme Court of Ontario, and therefore the rule of common law applied. Under this rule the interest claimed by the appellant company was not recoverable. In any event, the interest could not begin to run until the amount of damages had been ascertained. Reference to *Wolfe v. S.S. Clearpool* (1920), 67 D.L.R. 536; *Swift and Co. v. Board of Trade* (1925), 41 Times L.R. 411; *The Gertrude*, 13 P.D. 105.

December 21. MULOCK, C.J.O.:—This is an appeal from the order of Riddell, J., dismissing an appeal from the Master's report.

The action was brought to recover moneys expended by the plaintiff company for the repair of damage sustained by the defendant's steamer "John Dunn Junior" by the accident of the 9th December, 1918, in the pleadings mentioned.

The operative part of the judgment in the case is as follows:—

“2. This Court doth declare that the plaintiff is entitled to recover from the defendant the damage to the steamer ‘John Dunn Junior,’ sustained by the accident of the 9th December, 1918, in the pleadings mentioned, and doth order and adjudge the same accordingly.

“3. And this Court doth order and adjudge that it be referred to the Master in Ordinary of this Court to inquire and state the damages in the next preceding paragraph mentioned.

“4. And this Court doth further order and adjudge that the costs of the said reference be in the discretion of the said Master in Ordinary and shall be paid as he shall direct.

“5. And this Court doth further order and adjudge that the said defendant do pay to the said plaintiff such sum as the said Master may find the plaintiff entitled to as damages and costs aforesaid, forthwith after the confirmation of the said Master’s report.

“6. And this Court doth further order and adjudge that the said defendant do pay to the said plaintiff its costs of this action up to and including this judgment, forthwith after taxation thereof.”

The Master by his report found “that the damage to the steamer ‘John Dunn Junior’ sustained by the accident of the 9th December, 1918, in the pleadings herein mentioned, amounts to the sum of \$38,547.86.”

The plaintiff company appealed from the report on the ground that the learned Master erred in not allowing interest on the moneys expended for the repair of the said damage. The appeal was heard by Riddell, J., and was dismissed, and this appeal is from such dismissal, and the question for this Court to determine is whether the Master should have allowed interest on the said expenditures.

The judgment does not declare the plaintiff company entitled to recover damages which it may have sustained because of the injury to the steamer, but merely that it is entitled to recover “the damage to the steamer.” This language limits the amount recoverable to the amount of actual damage to the steamer. Interest on the expenditure in repairs may be damage to the plaintiff company, but is not “damage to the steamer.”

For these reasons I am of opinion that the judgment does not entitle the plaintiff company to interest on the said expenditures, and, therefore, the Master rightly determined the question.

This appeal fails and should be dismissed with costs.

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HODGINS, J.A.:—Appeal on the question of interest on damages arising from breach of contract. The Master, to whom the ascertainment of these damages was referred, allowed no interest on the damages fixed by him, and this was affirmed by Riddell, J.

In the main case, *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Ltd.*, [1924] 4 D.L.R. 1101, Lord Carson, delivering the judgment of the Judicial Committee, said (p. 1106):—

“It must, in their Lordships’ opinion, be held that it was the breach of contract in not lightering the vessel which was the immediate cause of the damage, and the fact that such damage might not have occurred if the anchor had not been sunk, can make no difference. If grounding takes place in breach of contract, the precise nature of the damage incurred by grounding is immaterial.”

Lord Carson also said that the Committee refrained from dealing with the question of breach of duty to warn the vessel as to the safety or otherwise of the chosen berth.

This case must therefore be determined on the principles applicable to breaches of contract where the damages are not ascertainable by mere computation, or where it cannot be said that payment of a just debt has been improperly withheld.

This Court is bound by the decision in *Bradley v. Bailey and Jasperson*, 52 O.L.R. 435 (a case of breach of contract), to hold that, where the amount payable is in the nature of damages which require an investigation in order to fix the amount, interest does not begin to run until the amount of damages has been fixed or ascertained. To the same effect is a judgment of the Second Divisional Court in *McLean v. Canadian Pacific Railway Co.*, 53 O.L.R. 533, in which the principle to which I have adverted was applied in a case of compensation for closing a street.

To decide otherwise would be, as suggested by a sentence in the judgment of Cave, L.C., in *Swift and Co. v. Board of Trade*, 41 Times L.R. 411, at pp. 412, 413, [1925] A.C. 520, at p. 533, to give compensation for the time occupied in ascertaining the damages. The Master’s report is dated on the 17th April, 1925, from which time interest should run. I presume this will be ordered on further directions.

The appeal should be dismissed.

*Appeal dismissed with costs.*

## [APPELLATE DIVISION.]

NEW ONTARIO COLONIZATION CO. LTD. v. GRAND TRUNK  
RAILWAY SYSTEM.1925.  
Dec. 21.

*Sale of Goods—Stoppage in Transitu—Sale of Goods Act, 1920, 10 & 11 Geo. V. ch. 40, secs. 43, 44, 45(1)—Consignee, whether Agent of Purchaser — Presumption — Evidence — Sufficiency of Notice—Bankruptcy—Filing Claim and Receipt of Dividend—Adoption of Misdelivery.*

The defendant, a common carrier, came into possession of two car-loads of lath consigned by the plaintiff, the vendor, to J., the vendee's nominee. The vendee becoming insolvent, the plaintiff, as an unpaid vendor, notified the defendant to withhold delivery; but the defendant, after receiving the notice, delivered the lath to J.—

*Held*, that the right to stop *in transitu* existed so long as the goods were "in course of transit" (sec. 43 of the Sale of Goods Act, 1920), and they are taken to be in course of transit from the time of delivery to the carrier until the buyer or his agent takes delivery of them (sec. 44); and, while these two sections imply that there must exist the relationship of vendor and vendee in respect of the goods entrusted to the carrier, they do not require delivery for carriage to the vendor by name; there was no evidence or presumption that the vendee had sold the lath to J.; and the fair presumption was that the lath was delivered to the defendant for transmission to the vendee through J.

The plaintiff's notice sufficiently complied with the requirements of sec. 45(1) of the Act.

The plaintiff, as a creditor of the insolvent vendee, filed a claim with the trustee in bankruptcy and received a dividend thereon:—

*Held*, that, as it did not appear that the claim filed was for the price of goods sold and delivered, the filing of the claim and the acceptance of the dividend could not be construed as an adoption of the misdelivery.

*Verschures Creameries v. Hull and Netherlands Steamship Co.*, [1921]. 2 K.B. 608, distinguished.

Judgment of RIDDELL, J., 57 O.L.R. 244, affirmed.

AN appeal by the defendant from the judgment of RIDDELL, J., 57 O.L.R. 244.

December 6. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

*J. P. Pratt*, for the appellant.

*Everett Bristol*, for the plaintiff company, respondent.

December 21. The judgment of the Court was read by MULOCK, C.J.O.:—This is an appeal from the judgment of Riddell, J. The facts are as follows:—

On the 21st March, 1921, the plaintiff sold to the Toronto Timber Company two car-loads of lath to be delivered in

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Toronto. On the 25th March, 1921, the plaintiff received instructions from the Toronto Timber Company to ship the lath to one James at Toronto. On the 25th March, the plaintiff at Jonesborough delivered to the defendant one of the said car-loads, and on the 28th March delivered to the defendant the other car-load, each consigned to the said James, for carriage to Toronto, the defendant issuing bills of lading therefor and stating therein that the plaintiff was the consignor and James the consignee. Thus the railway company came into possession of the two car-loads consigned by the vendor to James, the buyer's nominee. The Toronto Timber Company becoming insolvent, the plaintiff, the unpaid vendor, on the 30th March, 1921, notified the defendant to withhold delivery; but the defendant, after receipt of notice and having had reasonable opportunity of conforming to the same, delivered the lath to the said James; and this action is brought to recover the value of the lath, less freight and dividend received from the bankrupt estate of the Toronto Timber Company.

The learned trial Judge held that the plaintiff was entitled to stop the lath *in transitu*, and gave judgment for the plaintiff, and this appeal is from his judgment.

One ground of appeal is that the lath having been consigned to a person other than the original purchaser, the unpaid vendor had no right to stop *in transitu*. Such right exists "so long as they" (the goods) "are in course of transit" (sec. 43 of the Sale of Goods Act, 1920, 10 & 11 Geo. V. ch. 40), and by sec. 44 they are taken "to be in course of transit from the time when they are delivered to a common carrier . . . or other bailee, for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such common carrier or other bailee."

Whilst these two sections imply that there must exist the relationship of vendor and vendee in respect of the goods entrusted to the carrier, they do not require delivery to the carrier for carriage to the vendee by name, and it is, I think, sufficient if such delivery be for the purpose of transmission to him. In the present case the Toronto Timber Company was the buyer, and directed the vendor to ship to its nominee James. There is no evidence that the Toronto Timber Company sold the lath to James, and its mere direction to the plaintiff to ship to James would not, in my opinion, warrant the Court in finding that the company had sold the lath. Thus it follows that the Toronto Timber Company remained the owner, and the fair presumption is that the

lath was delivered to the defendant for transmission to the Toronto Timber Company through the said James.

The defendant also contended that the plaintiff had not given notice of its claim as required by subsec. 1 of sec. 45 of the said Act.

For the reasons given by the learned trial Judge, I am of opinion that effect cannot be given to this contention.

The plaintiff, as a creditor of the insolvent company in respect of the lath, filed a claim with the trustee in bankruptcy and received from him a dividend thereon, and the defendant contends that the plaintiff thereby adopted the act of the defendant in delivering the lath to James, and that in consequence he is not entitled to treat it as a misdelivery. In support of this contention, the defendant's counsel relies upon *Verschures Creameries v. Hull and Netherlands Steamship Co.*, [1921] 2 K.B. 608. In that case, after the carrier had misdelivered certain goods and with knowledge of such misdelivery, the consignor sued and obtained judgment against the party to whom they were delivered for the price of goods sold and delivered, and it was held that the consignor had thereby elected to treat the delivery as authorised, and could not thereafter treat it as unauthorised.

In the present case it does not appear that the claim filed was for goods sold and delivered, and therefore the filing of the claim and the acceptance of a dividend cannot be construed as adoption of the misdelivery.

For these reasons, I think the appeal fails, and should be dismissed with costs.

*Appeal dismissed.*

#### [APPELLATE DIVISION.]

#### MASTRON V. COTTON.

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*Partition—Joint Tenants—Husband and Wife—Payments Made by both on Account of Purchase-money and in Reduction of Encumbrances—Account—Occupation by Wife—Payments for Interest, Repairs, and Taxes—Payments Made after as well as before Divorce—Occupation Rent—Just and Equitable Allowances.*

In July, 1919, the plaintiff purchased land with a house upon it, and, by his direction, the conveyance was made to himself and his wife (the defendant) as joint tenants. The husband and wife jointly occupied the house till November, 1919, when the plaintiff left, and the defendant had since occupied it rent free, but she paid the interest and part of the principal secured by mortgages on the property and also the taxes and cost of repairs. The plaintiff in fact paid

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\$400 and the defendant \$1,300 of \$1,700 actually paid on account of the purchase-price. The parties were divorced in July, 1924. The plaintiff sued for partition or sale, and obtained a judgment for sale. By the judgment a reference was ordered and the Master was directed, in ascertaining the rights of the plaintiff and defendant in the land, to treat their interests as equal, save for any payments made by either party, since the date of the divorce, in reduction of principal and interest owing on the encumbrances:—

*Held*, on appeal by the defendant from that judgment, that when a joint tenancy is terminated by an order for partition or sale, the Court may, in the action, make all just allowances and give such directions as will do complete equity between the parties; and when one tenant has paid more than the other in reduction of encumbrances he is entitled to an allowance for the surplus.

The circumstances in which the payments were made by the defendant did not indicate that she was making gifts to her husband; and she was *held* entitled, on the distribution of the money arising from the sale directed by the Court, to have taken into account all payments made on the purchase-price or on principal moneys secured by the mortgages, irrespective of whether such payments were made before or after the divorce, and all payments made for interest, taxes, and repairs after she ceased to occupy; but she should not receive credit for payments made on account of interest, taxes, and repairs during the period of occupation unless she submitted to an allowance for use and occupation.

The judgment was amended accordingly.

APPEAL by the defendant from the judgment of MEREDITH, C.J.C.P., at the trial (29th May, 1925), declaring the plaintiff and defendant to be joint tenants of certain land, ordering a partition or sale thereof, and giving directions as to the apportionment of payments made in reduction of incumbrances.

November 11. The appeal was heard by MULOCK, C.J.O., MAGEE, FERGUSON, and SMITH, JJ.A.

*W. R. Smyth*, K.C., for the appellant, contended that she was entitled to an accounting in respect of the payments made by each of the parties for the land in question. Partition is an equitable relief: since the plaintiff seeks equity, he must do equity. The appellant is entitled to an accounting in respect of payments made before, as well as after, the date of the divorce of the parties, and to contribution from the plaintiff. The fact that the parties were joint tenants does not affect the appellant's right to an accounting and contribution. The trial Judge erred in awarding costs against the appellant. Reference to Carr on Collective Ownership (1907), p. 39; *Thornley v. Thornley*, [1893] 2 Ch. 229; *Leigh v. Dickeson* (1884), 15 Q.B.D. 60; *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234; *Garrick v. Tayler* (1862), 31 L.J. Ch. 68; Halsbury's Laws of England, vol. 16, p. 404; vol. 21, pp. 851-2; vol. 24, p. 204; *Dyer v. Dyer* (1865), 34 L.J. Ch. 513; *Outram v. Hyde* (1875), 24 W.R. 268.

*G. M. Willoughby*, for the plaintiff respondent, argued that there was no gift made by the appellant to the respondent, from which might flow a resulting trust, and that the appellant was not entitled to an accounting in respect of any payments made before the date of the divorce. Reference to *Dunbar v. Dunbar*, [1909] 2 Ch. 639.

*Smyth*, K.C., in reply, referred to Halsbury, vol. 16, pp. 394 *et seq.*

December 21. The judgment of the Court was read by FERGUSON, J.A.:—The plaintiff and defendant were formerly husband and wife, but were divorced on the 18th July, 1924, by Act of the Parliament of Canada.

On the 15th July, 1919, the plaintiff (the husband) agreed to purchase house No. 371 Montrose avenue, Toronto, and directed the conveyance to be made to himself and the defendant as joint tenants. That was done.

The purchase-price of the property was \$4,000, payable \$600 in cash and the balance by the assumption of a first mortgage of \$1,400 and second mortgage of \$2,000.

The parties jointly occupied the premises for a period of about four months, i.e., till the 19th November, 1919, when the plaintiff left, and the defendant has since occupied the premises rent free, but she has paid the interest and part of the principal moneys secured by the mortgages, also the taxes and cost of repairs.

According to the wife's evidence, she has paid about \$1,300 and the plaintiff \$400 of the \$1,700 actually paid on account of the purchase-price, some payments being made prior to divorce and some after.

The plaintiff sued for partition. At the trial the defendant sought to establish an agreement that in consideration of her not defending an application the plaintiff made for a divorce in Michigan and of her applying for and obtaining a divorce in Canada, the husband would give her his interest in the house.

The action was tried by the learned Chief Justice of the Common Pleas. He reached the conclusion that the alleged agreements were not proven and if proven could not be given effect to, and pronounced judgment declaring that the parties were joint tenants and that the plaintiff was entitled to partition, and directed a sale.

I see no reason to doubt the correctness of the foregoing conclusions, declaration, and direction of the learned trial Judge, but the defendant finds fault with other or special directions given by the learned Judge in reference to the inquiries to be made

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and accounts to be taken by the Master. These directions are found in para. 2 of the judgment, which reads:—

“And this Court doth further order and adjudge that in ascertaining the rights of the plaintiff and defendant in the said lands and premises the said Master shall treat the interests of the plaintiff and defendant as equal, save for any payments in reduction of principal and interest owing on the encumbrances against the said lands and premises made by either party since the 19th day of July, 1924.”

It is not seriously disputed that according to the intention of the parties at the time of the purchase they were to hold in equal shares, but the defendant strenuously objects to the direction which limits her to receiving in the accounting credit for only such payments as she made after the divorce. She contends that if the shares of the parties are not, in the circumstances of the case, to be fixed by reference to the amount each has contributed to the purchase-price, but are to be equal, then in the accounting the payments should also be equalised by giving her credit for all her payments irrespective of the date of the making thereof. This contention appeals to me as being fair and equitable, and it remains to be considered whether it may and should be allowed.

The learned trial Judge gave no reason for limiting the accounting to payments made since the divorce, and I am unable to find anything in evidence to suggest a reason.

While the general rule is that one joint tenant, unless ousted by his co-tenant, may not sue another for use and occupation, it seems clear that when the joint tenancy is terminated by a court order for partition or sale, the Court may in such proceedings make all just allowances and should give such directions as will do complete equity between the parties: *Gage v. Mulholland* (1869), 16 Gr. 145; *Rogers v. Mackenzie* (1799), 4 Ves. 751; 33 Corpus Juris, p. 909; Taylor's Equity, para. 376.

What is just and equitable depends on the circumstances of each case. For instance, if the tenant in occupation claims for upkeep and repairs, the Court, as a term of such allowance, usually requires that the claimant shall submit to an allowance for use and occupation: *Rice v. George* (1873), 20 Gr. 221; *Pascoe v. Swan* (1859), 207 Beav. 508. Again, if one tenant has made improvements which have increased the selling value of the property, the other tenant cannot take the advantage of increased price without submitting to an allowance for the improvements: *Leigh v. Dickeson*, 15 Q.B.D. 60, per Cotton, L.J., at p. 67; Halsbury's Laws of England, vol. 21, p. 851. And, once again, when, as here, one tenant has paid more than his share of encumbrances,

he is entitled to an allowance for such surplus: *In re Curry, Curry v. Curry* (1898), 25 A.R. 267; 33 Corpus Juris, p. 909. App. Div. 1925.

These allowances being made as equitable allowances, there may as a matter of course be circumstances under which they should not be made. For instance, the circumstances may indicate that the improvements were made or the surplus payments were made or intended to be made as gifts by one tenant to the other—as by the husband for the benefit of the wife; and it may be that had the surplus payments in this case been made by the husband rather than by the wife the Court would, in the absence of something to shew a contrary intention, presume that they were gifts to the wife: *Dunbar v. Dunbar*, [1909] 2 Ch. 639. But the circumstances under which these payments were made by the wife clearly indicate that the defendant was not, in reducing the encumbrance, imbued with the idea of making gifts to her husband; and I am therefore of opinion that as between herself and the plaintiff she is, on the distribution of the money arising from the sale of the property, entitled to have taken into account all payments made on the purchase-moneys or on principal moneys secured by the mortgages, irrespective of whether such payments were made before or after divorce, and all payments made on interest, taxes, and repairs after she ceased to occupy; but that she should only be allowed payments on account of interest, taxes, and repairs during the period of occupation if she elects to submit to an allowance for use and occupation; and I would, for these reasons, allow the appeal in part and amend the judgment accordingly.

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While the defendant did not succeed in obtaining the relief she sought by her appeal, she has secured substantial relief, and I would award her the costs of this appeal.

*Appeal allowed in part.*

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[APPELLATE DIVISION.]

REX v. BANK OF NOVA SCOTIA.

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*Crown—Sales and Excise Taxes—Bank—Security on Goods of Debtor under Bank Act, sec. 88—Goods Insured for Benefit of Bank—Destruction by Fire—Insurance Moneys Paid to Bank—Claim by Crown to “Charge” Prior to Claim of Bank—Whether Insurance Moneys “Assets” of Debtor—Special War Revenue Act, 1915—Amending Act 12 & 13 Geo. V. ch. 47, sec. 17—Repeal by 15 & 16 Geo. V. ch. 26, sec. 9.*

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The defendant bank made advances of money to a manufacturing company on the security of stocks of goods hypothecated by assign-



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ments under sec. 88 of the Bank Act. The bank insured the goods against loss by fire. The goods were destroyed by fire, and the insurance moneys were paid to the bank, whose claim for advances not repaid exceeded the amount of the insurance moneys. At and before the time of the destruction of the goods, the company was indebted to the Crown for unpaid sales and excise taxes. The Crown claimed to be entitled to a charge on the insurance moneys paid to the bank and to be paid thereout the amount owing for unpaid taxes:—

*Held*, that the insurance moneys were not "assets" of the company within the meaning of sec. 17 of the Dominion statute 12 & 13 Geo. V. ch. 47, amending the Special War Revenue Act, 1915, and there was no charge upon them in favour of the Crown.

Summary of dictionary definitions of "assets."

Upon the destruction of the goods, all charges upon them ceased to exist; and, as the bank's claim exceeded the amount of the insurance moneys, the company had no interest in those moneys amounting to an "asset."

*Per SMITH, J.A.*:—The word "assets" includes only the debtor's own interest in property, and not the interest he conveys away in good faith to others.

Reference to earlier cases.

Section 17 has been repealed by 15 & 16 Geo. V. ch. 26, sec. 9.

AN appeal by the defendant bank from the judgment of LOGIE, J., at the trial (1st June, 1925), in an action brought in the name of his Majesty, by the Attorney-General for Canada, awarding the plaintiff a declaration in his favour and other relief.

November 27. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

*R. H. Parmenter*, K.C., for the appellant bank.

*W. R. Smyth*, K.C., for the Crown, respondent.

December 21. MULOCK, C.J.O.:—This is an appeal from Logie, J., who gave judgment for the plaintiff.

The action was brought by his Majesty the King, on behalf of the Dominion of Canada, for a declaration that the defendant, a chartered bank carrying on business in Canada, had in its hands moneys of the Silver Leaf Cloaks and Suits Limited, liable under (1922) 12 & 13 Geo. V. ch. 47, sec. 17 (amending the Special War Revenue Act, 1915), for payment of the plaintiff's claim against the company for arrears of sales and excise taxes due by the company to the plaintiff, and for judgment against the defendant bank for \$1,793.01, the amount of such arrears.

The facts are as follows:—

The Silver Leaf Cloaks and Suits Limited, a manufacturing company carrying on a manufacturing business in the city of Toronto, made various written applications to the bank for a

line of credit, and for advances on the security of certain goods, manufactured or to be manufactured by the company, the company agreeing to give to the bank, from time to time and as often as required, security for such advances, by assignments under sec. 88 of the Bank Act, covering all the said goods; and, by a certain other writing, the company agreed with the bank to keep the goods insured against loss or damage by fire for the benefit of the bank. Thereupon the bank, on the terms and conditions set forth in the said paper writings, from time to time made advances to the company, the latter assigning to the bank its stocks of goods in accordance with the provisions of sec. 88, as security for such advances, and also effecting insurance against loss or damage on the said goods by fire, the insurance moneys payable in respect of any such loss or damage being, as stated in each policy, made payable to the bank. The said goods so assigned to and held by the bank as security for such advances were, on the 15th February, 1924, destroyed by fire. At this time the unpaid advances made by the bank to the company exceeded the amount of the insurance moneys, which the insurance companies paid to the bank. At and for some time prior to the destruction of the said goods, the company was, and still is, indebted to the Crown for unpaid sales and excise taxes; and the Crown in respect thereof claims that, by virtue of the said sec. 17, it became entitled to a charge on the insurance moneys so paid to the bank, and to payment thereout to the Crown of the amount owing to it for unpaid taxes. Section 17 is as follows:—

“Notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law, the liability to the Crown of any person, firm, or corporation, for payment of the excise taxes specified under the Special War Revenue Act, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm, or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets.”

The statutory charge thus sought to be created is upon the debtor's “assets.” Were these insurance moneys “assets” of the company? If not, there was no charge. Leading dictionaries deal with the meaning of the term “assets” as follows:—

*Murray's Dictionary.* “*Assets.* The origin of the English use is to be found in the Anglo-French law phrase *aver assetz*, to have sufficient, viz. to meet certain claims; whence ‘assets’ passed as a technical term into the vernacular. 1. *Law.* Originally:

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Sufficient estate or effects; 'Goods enough to discharge that burthen which is cast upon the executor or heir in satisfying the testator's or ancestor's debts and legacies.' . . . By extension applied to: Any property or effects liable to be applied as in sense 1, without regard to its being *sufficient*. . . . *Law and Comm.* Effects of an insolvent debtor or bankrupt, applicable to the payment of his debts; and by extension: All the property of a person or company which may be made liable for his or their debts"

*Funk & Wagnall's New Standard Dictionary.* "Law. (1) The property of an insolvent debtor applicable to the payment of his debts. (2) All the personal or movable property of a deceased person that is convertible into money and held for the payment of debts or legacies. . . . (3) All the property, real and personal, of a deceased or bankrupt person, of a corporation, or of a partnership, which is or may be chargeable with the debts or legacies of such parties or persons. . . . 3. Property in general, regarded as applicable to the payment of debts"

*Webster's Dictionary.* "1. Law. *a* Originally, property of a deceased person which, in the hands of his heir or executor, is sufficient to pay his debts and legacies; hence, the property of a deceased person subject by law to the payment of his debts and legacies. *b* The entire property, of all sorts, of an insolvent or bankrupt, or of a person, association, corporation, or estate, applicable or subject to the payment of his or its debts."

*Concise Oxford Dictionary.* "Enough goods to enable heir to discharge debts and legacies of testator; property liable to be so applied; effects of insolvent debtor; property of person or company that may be made liable for debts."

"Item of this in balance sheet, loosely any possession."

*Century Dictionary.* (As in Murray's), and "generally used to signify resources for the payment of debts."

*Imperial Dictionary.* "Goods or estate of a deceased person sufficient to pay the debts of the deceased. But the word *sufficient*, though expressing the original signification of *assets*, is not necessary to the definition. In present usage, *assets* are the money, goods, or estate of a deceased person, subject by law to the payment of his debts and legacies."

*Encyclopædia Britannica.* "In English law strictly the property of a debtor in the hands of his representative sufficient for the satisfaction of the creditors or legatees. Thus the property of a bankrupt is termed his assets and is the fund out of which his liabilities must be paid. All property of the debtor is assets, and it is not necessary that it should have been reduced into possession by him."

It is clear from the foregoing definitions of the word "assets" that nothing is an asset of a debtor within the meaning of sec. 17, unless it is "the property" (including in that term a chose in action) of the debtor and is applicable in payment of his debts.

Counsel for the Crown contended that during the existence of the goods in question the Crown had thereon a charge which ranked prior to that of the bank. Inasmuch, however, as upon their destruction all charges on them ceased to exist, it is unnecessary for us to determine this abstract question.

Counsel for the Crown also argued that upon the destruction of the goods the insurance moneys must be considered as taking the place of the goods themselves.

What we have to determine is, whether the insurance moneys in question were assets of the debtor within the meaning of sec. 17. Those moneys were the fruits of certain insurance contracts contained in certain insurance policies whereby the insurance companies were bound to make good to the bank the loss sustained by it because of the destruction of the insured goods: in other words, the bank had an enforceable claim against the insurance companies for indemnification. The debtor-company was a party to and was bound by these insurance contracts, and could maintain no claim for any benefit thereunder to the prejudice of the bank's claim. Inasmuch as the bank's claim exceeded the total amount of the insurance moneys, the bank was entitled as against the debtor-company to apply the whole amount paid to it on account of its claim. Thus the debtor-company had no interest in the insurance moneys amounting to an "asset" within the meaning of sec. 17, upon which the Crown could have a charge.

I therefore think the appeal should be allowed, and the action dismissed with costs here and below.

MAGEE, HODGINS, and FERGUSON, JJ.A., agreed with MULOCK, C.J.O.

SMITH, J.A.:—I agree with my Lord the Chief Justice, but wish to add a reference to previous decisions as to the effect of sec. 17 of 12 & 13 Geo. V. ch. 47:—

In *Re Horton*, 4 C.B.R. 273, on an appeal before me on the 26th July, 1923, from the ruling of a trustee in bankruptcy, by the Attorney-General, I held that a *bonâ fide* chattel mortgage had priority over excise taxes, taking the same view as that now laid down by my Lord the Chief Justice as to the meaning of the word "assets" in this sec. 17. It was stated at the time that the Attorney-General was appealing in order to get a ruling on a point considered doubtful. The case is not reported anywhere

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 1925. is not referred to in any of the cases subsequently arising under  
 this section.

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 Smith, J.A. In *Attorney-General for Canada v. Gordon*, 56 O.L.R. 48,  
 decided on the 29th August, 1924, Wright, J., held that under  
 sec. 17 of the statute of 1922 the Crown's claim for excise taxes  
 takes priority over a prior bank lien on goods under the Bank  
 Act. Under sec. 17 the Crown is only given a prior charge on  
 the debtor's assets; and the word "assets," under the definition  
 here given, includes only the debtor's own interest in property, and  
 not the interest he has conveyed away in good faith to others.

In *Re Davis* (1924), 26 O.W.N. 426, 4 C.B.R. 698, and in  
*Re Calcus Co. Ltd.* (1925), 57 O.L.R. 272, Fisher, J., held that  
 the result of Dominion and Provincial legislation as it then  
 stood, including sec. 17, where there was no claim by the Crown  
 for excise taxes, was to place the landlord's claim first, but where  
 the taxes become due prior to the rent, and there is a trustee in  
 bankruptcy, the charges and expenses of the trustee come first,  
 the excise taxes next, and then the rent. He was, however,  
 reversed as to this in the latter case by a Divisional Court, the  
 judgment being by Riddell, J., at p. 277.

These two cases, however, dealing with rent, hardly touch  
 the point in issue here.

In the present case the debtor was entitled only to the surplus  
 insurance moneys over the bank claim, and it would be only that  
 surplus (if any) that would be included in the debtor's assets  
 on which the Crown is given a prior charge under sec. 17.

The question will be of importance only in connection with  
 claims arising prior to the 1st July, 1925, as sec. 17 referred to  
 has been repealed by 15 & 16 Geo. V. ch. 26, sec. 9.

*Appeal allowed.*

#### [APPELLATE DIVISION.]

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RUSSELL v. ONTARIO FOUNDATION AND ENGINEERING CO.

Dec. 21.

*Mechanics' Liens — Subcontractor (Material-man) — Time for Registering Claim of Lien—Mechanics and Wage-Earners Lien Act, 1923, 13 & 14 Geo. V. ch. 30, secs. 6(2), 22(1)—Delivery of Last Material—Material Rejected and New Material Supplied—Time of Completion—Absence of Fraud—Triviality of Work Done or Material Supplied—Bona Fides—Provisions of Subcontract—"Owner"—Form of Claim of Lien.*

A company which had contracted to erect and complete a building entered into a subcontract with another company, which was to supply all the cut stone required for the building—the stone to be so cut as to be ready to set. On the 3rd December, 1924, delivery

of the stone was completed, as both parties thought, but one stone was, when about to be set, found to be one foot shorter than specified. This stone was, on the 7th January, 1925, replaced by the subcontractor with one properly cut, and a claim of lien for the full amount of the subcontract was registered on the 22nd January, 1925:—

*Held*, that the late delivery was in *bonâ fide* completion of the subcontract, and not a subterfuge; and the claim, being registered within 30 days after the furnishing or placing of the last material (sec. 22(2) of the Mechanics and Wage-Earners Lien Act, 1923, 13 & 14 Geo. V. ch. 30), and also within 30 days after the completion of the subcontract (subsec. 1), was registered within the proper time.

The changes made by the Act of 1923 in secs. 6 and 22(1), noted.

The time of completion, under the Act, is, in the absence of fraud, the time when the material-man can sue for the price of goods sold and delivered.

The triviality of the work done or of its value does not affect the question, which is, whether in fact it is work done in good faith to complete the contract or make an effective delivery.

*Summers v. Beard* (1894), 24 O.R. 641, and *Neill v. Carroll* (1881), *ibid.* 642, note, are overruled in so far as they are contrary to this rule.

AN appeal by the plaintiff and other lienholders from the judgment of an Assistant Master, in a mechanic's lien action, allowing the claim of the Ritchie Cut Stone Company, another lienholder.

December 9. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

*John Jennings*, K.C., for the appellants.

*N. S. Macdonnell*, for the respondent company.

December 21. The judgment of the Court was read by HODGINS, J.A.:—The point raised is important but not difficult when the facts are understood.

The Ritchie Cut Stone Company contracted in writing to supply the Ontario Foundation and Engineering Company with all the cut stone, according to specifications and drawings, required for the Sewage Pumping Station in Toronto. The Ontario Foundation and Engineering Company had a contract with the Municipal Corporation of the City of Toronto, the owners of the land on which the pumping station was to stand, for its building and completion. The stone was to be cut by the Ritchie company so as to be ready to set.

On the 3rd December, 1924, delivery of the stone was completed, as both parties thought, but one stone was, when about to be set, found to be one foot shorter than specified. This stone was, on the 7th January, 1925, replaced by one properly cut by the Ritchie company, who registered a lien under their contract, for the full amount, on the 22nd January, 1925. They then began an action to enforce it, and on the next day registered a certificate thereof.

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The point involved between these lienholders is whether the Ritchie lien was registered in time, more than 30 days having elapsed since the 3rd December, 1924.

The question is really one of fact more than of law (*Benson v. Smith & Son* (1916), 37 O.L.R. 257; *Metal Studios Ltd. v. City of Kitchener* (1925), 29 O.W.N. 216); the learned Assistant Master has held that the Ritchie company were entitled to and did rectify what was evidently a mistake, and that view is clearly right and was not really contested.

For the appellants, counsel argued that to allow the substitution of material for that already delivered, and, as he said, accepted, would open the door to fraud. That cases somewhat similar have occurred, tainted with fraud, or in which what was done was for repair, experiment, or the supply of something not within the contract, is very true. See for example, *Brooks-Sanford Co. v. Theodore Telier Construction Co.* (1910), 22 O.L.R. 176; *Sander-son Percy & Co. Ltd. v. Foster* (1923), 53 O.L.R. 519. But where, as here, there is a finding that the late delivery was in *bonâ fide* completion of the contract, and not a subterfuge, then the law is reasonably clear on the point.

There have been two important changes made by the Mechanics and Wage-Earners Lien Act, 1923 (13 & 14 Geo. V. ch. 30). Under the former enactment, R.S.O. 1914, ch. 140, sec. 22, subsec. 1, which provided for the registration of a lien by a contractor or subcontractor, it was necessary that this should be done within 30 days of the completion or abandonment of "the contract." And that contract meant the contract direct with the owner, and not the subcontractor's own agreement with the main contractor: *Re Moorehouse and Leak* (1887), 13 O.R. 290; *Brooks-Sanford Co. v. Theodore Telier Construction Co.*, *ante*; *Laesser v. Orechkin* (1921), 50 O.L.R. 331. That subsection is now changed and provides that the contractor or subcontractor may register a lien "within 30 days after the completion or abandonment of the contract or of the subcontract as the case may be."

The other change is that a new subsection (2 of sec. 6) has been added, giving a lien for materials incorporated in the building though not delivered in strict accordance with the provisions of sec. 6, subsec. 1.

It is not necessary to call in aid the last change, for, in my judgment, sec. 22, subsec. 1 (as amended), and subsec. 2\*, cover this case.

\*Subsection 2 of sec. 22 of the new Act is in the same words as in the old Act, viz.: "(2) A claim for lien for materials may be registered before or during the furnishing or placing thereof, or within 30 days after the furnishing or placing of the last material so furnished or placed."



Some decisions have made a distinction between these two subsections, as they stood before amendment, holding that subsec. 1 applied to subcontractors who, though contracting with the main contractor and not with the owner, were contributing work and service on the building itself, while subsec. 2 covered those who furnished material to the contractor but had nothing to do with the building.

Assuming that this was correct (as to which, in view of the statutory definition of "subcontractor," I may say, with great respect, I have my doubts), the recent change clearly gives 30 days from the completion of a subcontract for registration of a lien, and this is not limited to any particular class of material-men. Rather, if there is any distinction, the two subsections recognise two modes of furnishing material, by an express contract, or by day by day delivery of material without anything beyond an indefinite order or request or such arrangements for supply as appear in the cases of *Re Moorehouse and Leak (supra)* and *Hall v. Hogg* (1890), 29 O.R. 13. However, both subsections can be invoked here, because what was done was clearly a completion of the contract, under subsec. 1, and a delivery in truth of the last material contracted for, under subsec. 2.

The test as to the time of the completion, under the Mechanics and Wage-Earners Lien Act, of the contract, has been considered in many cases, and is, in the absence of fraud, when the contractor can sue for goods sold and delivered: *Day v. Crown Grain Co.* (1907), 39 Can. S.C.R. 258; *Benson v. Smith & Son*, 37 O.L.R. 257, 268.

The triviality of the work done or its value is not the question. It is whether in fact it is work done in good faith to complete the contract or make an effective delivery: *Brynjolfson v. Oddson* (1916), 32 D.L.R. 270 (Man. C.A.), and cases therein cited; *Hurst v. Morris* (1914), 32 O.L.R. 346. The cases of *Summers v. Beard* (1894), 24 O.R. 641, and *Neill v. Carroll* (1881), *ibid.* 642, note, cannot now be supported in so far as they are contrary to this rule.

Even in case of trifling non-performance, the lien of the material-man has been allowed, the case being treated as governed by the principle applied in *H. Dakin & Co. Ltd. v. Lee*, [1916] 1 K.B. 566: see *Taylor Hardware Co. v. Hunt* (1917), 39 O.L.R. 85.

One point was much pressed, namely, that a provision in the contract made the receiving and unloading, without objection, of the stone which proved to be short, equivalent to an acceptance of it under the contract. which would preclude both parties from setting up that there could be further delivery of any other material in its place to fulfil the same.

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The clause reads in this way:—

“The purchaser further agrees to inspect all stone before removal from the cars, and in case of stone being found damaged to notify the receiving freight agent, and have him make notation of the damage, including the marks and numbers of the damaged stone, on the paid freight receipt before removal from the cars. All stone removed from the cars, without these notations being made on the paid freight receipt, shall be considered delivered in good order.”

The stone objected to was not a damaged stone in any sense. This clause has therefore no effect on the situation, which is really governed by the first part of clause 10, which reads as follows:—

“10. The purchaser further agrees to notify the company of any mistake in measurement of stone or stone claimed to be cut wrong or omitted in shipment, or as being defective, and to allow the company reasonable time to investigate such claims, before doing any cutting or replacing, the expense of which is expected to be deducted from the moneys payable to the company.”

These provisions, binding between the parties to the contract, do not suggest anything which militates against what was done or really affects the substantial question here.

Other matters were discussed on the appeal, including the meaning of the word “owner” and the form of lien filed. Our opinion on these points was given on the hearing, and it is necessary to say no more than that the registered lien followed the statutory form, and that the “owner” named therein was the one clearly intended and meant by the statute as worded and as expounded in numerous decisions.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

1925.

REX v. LAMOND.

Dec. 21.

*Criminal Law—Carnal Knowledge of Young Girl—Criminal Code, sec. 1003—Evidence—Unsworn Testimony of Children—Corroboration—Conduct of Accused.*

Upon a charge against the defendant of carnally knowing a girl under the age of 14, the prosecutrix, a child of 5½ years, and two other girls of 6 and 9 years respectively were allowed, under sec. 1003 of the Criminal Code, to give evidence without being sworn. Except the testimony of the other two girls, there was no direct corroboration of the story of the prosecutrix:—

*Held*, that the requirement of sec. 1003 that the unsworn testimony admitted must be corroborated by some other material evidence calls

for something that would be evidence apart from the statute; and it could not be said that the unsworn evidence of the injured child was corroborated by that of both or either of the other two children, or that they corroborated each other, or she them or either of them, within the meaning of the statute.

*Rex v. Whistnant* (1912), 8 D.L.R. 468, and *Rex v. McNulty* (1914), 16 D.L.R. 313, approved.

*Held*, also, that the conduct of the defendant himself did not afford corroboration; and his conviction was quashed.

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AN appeal by the defendant from his conviction by the Judge of the County Court of the County of Wentworth on a charge of carnally knowing a girl under the age of 14 years.

December 11. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

*S. F. Washington*, K.C., and *A. MacFarlane*, for the appellant, contended that the trial Judge erred in receiving the evidence of the prosecutrix, a child of tender years. They argued that there was nothing to convince the trial Judge that the child understood the duty of telling the truth. If the evidence of the child had been held to be inadmissible, the Crown would have had no case. The evidence of the infant prosecutrix was not admissible, since it was not voluntary. Her evidence was not sufficiently corroborated. Evidence of one child of tender years is not corroboration of the evidence of another such child: *Rex v. Osborne*, [1905] 1 K.B. 551, 556; *Rex v. Whistnant* (1912), 8 D.L.R. 468; *Rex v. McNulty* (1914), 16 D.L.R. 313; *Shorten v. The King* (1918), 57 Can. S.C.R. 118; *Rex v. Gemmill* (1924), 27 O.W.N. 201, 43 Can. Crim. Cas. 360; *Rex v. South* (1903), 39 C.L.J. 639; *Rex v. Kingham* (1902), 66 J.P. 393.

*F. P. Brennan*, for the Crown, asked the Court to decide whether or not the evidence of one child of tender years may corroborate the evidence of another such child. He argued that there was other corroboration in this case. The evidence of the appellant, given at the trial, weighed against himself to such an extent that it amounted to corroboration of the evidence of the prosecutrix. There was ample evidence to support a conviction. Reference to *Rex v. Fontaine* (1914), 23 Can. Crim. Cas. 159.

December 21. The judgment of the Court was (by direction of the Chief Justice) read by MAGEE, J.A.:—Peter Lamond appeals from his conviction on the 22nd October, 1925, at Hamilton, before the County Court Judge's Criminal Court, on a charge of carnally knowing a girl under the age of 14 years on the 3rd October, 1925, at Hamilton. The offence

App. Div. is alleged to have been committed while she and two other  
1925. young girls were at the house of the latter on the afternoon  
of the date mentioned. Their mothers were absent shopping, and  
v. except the three girls and two younger boys and a boarder asleep  
LAMOND. in his room there was no one in the house when the accused, as  
Magee, J.A. they say, came there. He had boarded there and was well known  
to the other two girls. The evidence was sufficient to satisfy the  
learned Judge of the guilt of the accused. The only substantial  
question is whether there was sufficient corroboration of the evi-  
dence of the three girls. Their ages were about  $5\frac{1}{2}$  years, 9,  
and 6 years, respectively. The learned Judge did not consider  
that they sufficiently understood the nature of an oath, but under  
sec. 1003 of the Criminal Code admitted their unsworn evidence,  
they, in his opinion, being of sufficient intelligence to justify  
its reception and understanding the duty of speaking the truth.  
No one else was known to be able to prove the prisoner's presence  
at the house or facts indicating his guilt.

Section 1003, while allowing such unsworn evidence, provides  
that no person shall be liable to be convicted of the offence charged  
unless the testimony admitted by virtue of the section and given  
for the prosecution is corroborated by some other material evi-  
dence in support thereof implicating the accused. In other words,  
the unsworn testimony must be corroborated. Can it be said that  
the unsworn evidence of the injured child is corroborated by that  
of both or either of the other two children, or that they cor-  
roborate each other, or she them or either of them, within the  
meaning of the statute? The requirement that the unsworn  
testimony admitted must be corroborated by some other material  
evidence seems plainly to call for corroboration by something  
which would be evidence apart from the statute. In effect, one  
uncorroborated unsworn witness cannot sufficiently corroborate  
another unsworn witness, nor can several do so. Such was the  
opinion of the Supreme Court of Alberta in *Rex v. Whistnant*,  
8 D.L.R. 468; and in *Rex v. McInulty*, 16 D.L.R. 313, the Court  
of Appeal in British Columbia came to the same conclusion as to  
corroboration by only one other unsworn child.

Then the only other corroboration alleged here would be the  
conduct of the accused himself—his unusual call, the same even-  
ing, upon the father of the two little girls, his answer when the  
elder one said he had been at the house, and his possible perjury  
in setting up an alibi. The call looks suspicious, but he  
had known the man, and had borrowed money from him,  
and it does not necessarily indicate anxiety about dreaded dis-  
closures. His answer, "What! me?" to the little girl, must be

taken in connection with his positive denial to the father a few minutes before. The attempted alibi is not positively displaced, but is not found satisfactorily established, as the learned trial Judge did not believe the prisoner and his witness, whose testimony did not agree. Thus the evidence falls short of the legal requirements owing to the youth of the children, and the conviction should be quashed.

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It is unnecessary to deal with any of the other questions raised.

*Appeal allowed.*

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[IN CHAMBERS.]

MCBRIDE v. ONTARIO JOCKEY CLUB LTD.

1925.

Dec. 29.

*Appeal—Privy Council—Motion for Allowance of Security—Forum—Judge of Supreme Court of Ontario—Practice—"Admitting the Appeal"—Right of Appeal under Privy Council Appeals Act—Where no Right, Application for Leave to Appeal Necessary—Forum—Secs. 2 and 11 of Act—Privy Council Rules of 1925, Rule 2—"Sum or Value" in Controversy.*

Ever since the original enactment of the Parliament of Canada, 1794, 34 Geo. III. ch. 2, sec. 36, now found, substantially unchanged, in the Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2, the right of appeal, in cases falling within its terms, to his Majesty in his Privy Council, has stood unchallenged, and no leave to appeal, either to be given by the Judicial Committee or by the Court below, has been regarded as necessary. In all cases where there is not an appeal as of right under the terms of the statute, the Courts of this Province have no jurisdiction to grant leave; but, although the statute is absolute in prohibiting an appeal in cases which do not fall within it, this does not deprive his Majesty of the prerogative right to grant leave to appeal in any case in which he sees fit to exercise that right.

Rule 2 of the Privy Council Rules of 1925 (see 57 O.L.R. Appendix I.), providing that an appeal shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of any such leave, in pursuance of special leave to appeal granted by his Majesty in Council, is not intended to interfere with the established practice in regard to appeals from the Courts of this Province. Section 11 of the Privy Council Appeals Act imposes upon the Judge of the Supreme Court to whom application is made the duty of allowing the security. This is not a function to be exercised by the Court, but by the officer designated by the statute; the Judge to whom the application is made, before he can allow the security, must determine whether the case is one that falls within the provision of the statute; and, if the answer is in the affirmative, the order should be one, not "giving leave to appeal," but "admitting the appeal."

*E. W. Gillett & Co. Ltd. v. Lumsden*, [1905] A.C. 601, followed.

The question whether, in any particular case, there is a right of appeal under the statute must be determined by reference to the



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judgment from which the appeal is to be taken; and, in this case, the judgment (*ante* 97) shewed that the matter in controversy did not exceed the sum or value of \$4,000 (sec. 2 of the Act)—no sum or value whatever was in dispute.

*Toussignant v. County of Nicolet* (1902), 32 Can. S.C.R. 353, applied and followed.

A motion to allow the security upon a proposed appeal to his Majesty in his Privy Council was, therefore, refused.

MOTION by the defendants for an order allowing a bond as security upon an appeal to his Majesty in his Privy Council from the judgment of the Second Divisional Court of the Appellate Division, *McBride v. Ontario Jockey Club Ltd.* (1925), *ante* 97.

December 22. The motion was heard by MIDDLETON, J.A., in Chambers.

W. N. Tilley, K.C., and M. H. Ludwig, K.C., for the defendants.

H. J. Scott, K.C., for the plaintiff.

December 29. MIDDLETON, J.A.:—The facts giving rise to the action are sufficiently set forth in the judgment from which it is sought to appeal, but some uncertainty as to the practice which ought to prevail on motions of this kind has arisen, as is evidenced by the fact that Mr. Justice Ferguson, in a recent case, *Boland v. Canadian National Railway Co.* (1925), *ante* 225, directed a motion originally before him in Chambers to stand for hearing before the full Court, where it was heard without objection and dealt with, and also from the fact that in no recent case has an order been issued, upon the allowance of security, giving leave to appeal to the Judicial Committee.

Upon the return of this motion I suggested the desirability of following the course adopted by my learned brother and referring this motion to be heard before the full Court. Objection, however, was taken to the adoption of this course as being entirely unwarranted by the practice of the Court and the provisions of the statute. I have, therefore, considered the question of practice involved, as well as the merits of the application, with great care.

Following immediately upon the Proclamation of 1763, which itself has been recognised as having the force of law, and the Constitutional Act of 1791, the Parliament of Canada passed the Act of 1794, 34 Geo. III. ch. 2, which, by sec. 36, enacted that the judgment of the Court of Appeal then established should be final, in all cases where the matter in controversy does not exceed the sum or value of £500 sterling, but in cases exceeding that amount, as well as in certain other cases not now material to be mentioned,

an appeal should lie to his Majesty in his Privy Council, upon proper security being given by the appellant to prosecute the appeal and to pay the costs of the appeal if it should be unsuccessful.

This section, modified in detail from time to time but substantially unchanged, has remained upon our statute-book ever since, and is now found in the Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2: "Where the matter in controversy in any case exceeds the sum or value of \$4,000 . . . an appeal shall lie to his Majesty in his Privy Council; and, except as aforesaid, no appeal shall lie to his Majesty in his Privy Council."

Ever since the original enactment, the right of appeal, in cases falling within its terms, to the Judicial Committee, has stood unchallenged, and no leave to appeal, from the Judicial Committee or from the Court below, has been regarded as necessary. In all cases where there is not an appeal as of right under the terms of the statute, the Courts of this Province have no jurisdiction to grant leave; and, although the statute is absolute in prohibiting a right of appeal in cases that do not fall within it, it is now established that this does not deprive his Majesty of the prerogative right to grant leave to appeal in any case in which he sees fit to exercise the prerogative right.

In 1908, Rules were passed by the Judicial Committee for the purpose of regulating appeals, and in these Rules is found a provision, now repeated in the Judicial Committee Rules of 1925 (see 57 O.L.R., Appendix I.), that an appeal shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of any such leave, in pursuance of special leave to appeal granted by his Majesty in Council, upon a petition on that behalf propounded by the intending appellant. The question being raised whether this Rule (Rule 2 of 1925) was intended to interfere with the practice that prevailed for more than a century, by which appeals from the Courts of this Province were taken to the Privy Council as of right, a communication was sent to the Registrar of the Privy Council, who advised the Registrar of the Court of Appeal of Ontario that the Rule was not intended to interfere with what had been the practice theretofore on appeals from the Court of Appeal to the Privy Council: Bentwich's Practice of the Privy Council (1912), p. 54, note. That text-writer (p. 53, note) carries forward the statement found in Safford and Wheeler's Privy Council Practice (1901), p. 396: "It will be observed that no leave has to be asked or obtained on appeal from Ontario. The provision is that 'an appeal lies.' This

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Middleton, J.A. accords with the Proclamation of 1763, under which the right of appeal from the Canadas arose."

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Turning, then, to the Ontario statute as it now stands, sec. 11 provides that "A Judge of the Supreme Court shall have authority to approve of and allow the security to be given by a party who intends to appeal to his Majesty in his Privy Council, whether the application for such allowance be made during the sittings of the Court, or at any other time." This, I think, clearly imposes upon the Judge to whom application is made the duty of allowing the security. This is not a function to be exercised by the Court, but by the officer designated by the statute, and it follows that the Judge to whom the application is made, before he can allow the security, must determine whether the case is one that falls within the provision of the statute. This view prevailed for many years, until, in the case of *E. W. Gillett & Co. Ltd. v. Lumsden*, [1905] A.C. 601, Mr. Justice Osler, who allowed security in that case, took the view that the competency of the appeal should be determined by the Judicial Committee, and not by the Judge allowing the security. Upon objection to the competency of the appeal being renewed before the Judicial Committee, the Committee were of opinion that the appeal was not competent, but further stated that on considering the terms of the Ontario statute "it seems clear to their Lordships that an allowance of the appeal is contemplated, and such an allowance must be one by the Court of Ontario. Having regard to the consequences that would follow from admitting an appeal, their Lordships think it is essential that the appeal should be admitted by the Court, and that the Court is bound to exercise its judgment in considering whether any particular case is appealable or not."

Though their Lordships spoke of the Court, no opinion was intended to be expressed as to the necessity of the order admitting the appeal being made by the full Court, or by an individual Judge. There the order was that of an individual Judge, and no suggestion is made that he improperly entertained the application.

It will be noticed that the expression used is "admitting an appeal" and not "giving leave to appeal," and I think that these words were used advisedly and in the light of the fact that the appeal was not by leave, but as of right, and as shewing the proper way of indicating that, in the opinion of the Judge, the case is one falling within the statute permitting the appeal.

From this I conclude that it is the duty of the Judge to whom an application is made to allow security to determine not alone the sufficiency of the security but also whether there is an appeal under



the statute, and that if the answer is in the affirmative, then the order should be, not "giving leave to appeal," but "admitting the appeal." This might well be prefaced by a recital that "it appears that the case is one in which the appellant has, under the provisions of the statute, a right to appeal to his Majesty in his Privy Council."

Therefore I next consider the question whether there is in this case a right of appeal under the statute, and I think that must be determined by the judgment pronounced.

A share of the capital stock of the Ontario Jockey Club owned by Millar was sold by him to McBride. Millar had entered into an agreement to abide by the terms of a by-law of the Jockey Club, the effect of which was to prevent his free transfer of the share. He had to offer it for sale to a nominee of the club before he could transfer it to his own nominee, the intention being to give those in charge of the club a controlling voice as to the personnel of its membership. For the reasons given, the Court was of opinion that this provision was invalid, and so McBride was entitled to be entered upon the stock-register of the club as a shareholder, and this was so declared.

The share of stock is admittedly of less value than \$4,000, the amount named in the present statute, and it is argued that "the matter in controversy" in this case does not "exceed the sum or value of \$4,000," and therefore there is no right of appeal. Unquestionably, looked at from the standpoint of the Jockey Club, the matter is of the greatest importance, but I cannot bring myself to believe that the right of McBride to be registered in respect of this share, itself worth less than \$4,000, can in any way be regarded as falling within the words of the statute. There is no sum or value whatever in dispute. The question is a question of a totally different kind and description.

Similar if not precisely identical words are found in the Act governing the right of appeal to the Supreme Court of Canada, and in the case of *Toussignant v. County of Nicolet* (1902), 32 Can. S.C.R. 353, the Supreme Court denied its jurisdiction to entertain an appeal in a suit to annul a *procès-verbal* establishing a public highway, notwithstanding that the effect of the *procès-verbal* in question might be the involving of expenditure of over \$2,000, payment for which the appellant's lands would be levied on for assessment by the municipal corporation. The Court there stated the principle in words that, I think, effectively answer Mr. Tilley's argument in this case: "There is no pecuniary amount in controversy; in other words, there is no controversy as to a

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pecuniary amount or of a pecuniary nature. It is settled law that neither the probative force of a judgment, nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29 of the Supreme Court Act." This view is also in accordance with the opinion expressed in *City of Toronto v. Incandescent Electric Light Co.* (1906), 11 O.L.R. 310; *Canadian Pacific Railway Co. v. City of Toronto* (1909), 19 O.L.R. 663; *Beardmore v. City of Toronto* (1910), 2 O.W.N. 479; and the recent decision in *Boland v. Canadian National Railway Co.*, ante 225.

In all cases of this type it is at once apparent that the matter may be of infinitely greater importance to one side than to the other, by reason of its collateral and probative effect. So far as McBride is concerned, this case deals with his ownership of this stock, and his right to membership in the club. If he cannot be registered, he has, no doubt, the right to a refund of the price from Millar, and the test then becomes, so far as he is concerned, clearly one involving no pecuniary sum, but sentiment and little more than sentiment, while from the standpoint of the Jockey Club the real question is not so much the personal membership of McBride in the club as the far wider question of its right to control its own membership, a matter clearly not capable of being measured by any pecuniary standard. In all cases such as this, it seems more reasonable and satisfactory that an appeal beyond the provincial courts should be by leave only, for then proper terms may be imposed to avoid the oppressive consequences of the added expense incident to further litigation, a discretion which cannot be exercised when the appeal is of right.

Here, a motion may be made either to the Court of this Province or to the Supreme Court of Canada, for leave to appeal to the latter court, or a petition may be presented to his Majesty in the Judicial Committee, and upon such application such order may be pronounced as will enable justice to be done.

The motion fails and must be dismissed.

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[ROSE, J.]

TORONTO HOSPITAL FOR CONSUMPTIVES v. CITY OF TORONTO.

1926.

Jan. 2.

NATIONAL SANITARIUM ASSOCIATION v. CITY OF TORONTO.

*Municipal Corporations—Liability for Charges for Treatment of Indigent Patients in Hospitals—Order for Treatment—Right to Withdraw—Infant Patients—Liability of Parents—Proof of Ability to Pay — “Indigent” — “Resident” — Intention — Hospitals and Charitable Institutions Act, R.S.O. 1914, ch. 300, secs. 19, 20, 23.*

These actions were brought against a city corporation to recover the amounts of the plaintiffs' charges for treating patients in their hospitals, which were “receiving aid,” within the meaning of sec. 19 of the Hospitals and Charitable Institutions Act, and were bound to admit and care for persons brought to them while suffering from tuberculosis (secs. 19 and 20). By sec. 23, if a patient admitted is “indigent,” the corporation of the municipality in which he is “resident” at the time of his admission is liable for the charges for his treatment.

(1) A girl of 15 was admitted to one of the hospitals in September, 1921, on an order from the defendants' Medical Officer of Health, and remained there at the expense of the defendants until, in January, 1925, that officer wrote to the hospital governors cancelling his order, on the ground that her father was possessed of means. She was then still suffering from tuberculosis and could not be discharged, and so remained in the hospital after the notice. She had no means of her own, but her father was not indigent:—

*Held*, that, while a parent is under a moral obligation to maintain his infant child, the mere fact that the child is maintained by others does not bring the parent under a legal obligation to those others; the evidence in this case was insufficient to support a finding of a contract by the father; and, therefore, the charges for the treatment of the girl after the notice became effective should be paid by the defendants.

*Mortimore v. Wright* (1840), 6 M. & W. 482, 485, followed.

(2) A boy of 6 was admitted to one of the hospitals in December, 1921, on an order similar to that issued in the case of the girl, and the order for treatment was cancelled in the same way, in January, 1925, on the ground that the patient's father was not indigent. The patient was only 10 years of age and had no estate of his own.

*Semble*, that the father was bound to support the child; and if the defendants paid the charges for treatment they might have a claim against the father (sec. 25 of the Act); but these points could not be decided in an action to which the father was not a party; and *held*, having regard to the father's resources and the expense of maintaining his wife and other children, as disclosed by him in his evidence at the trial, that he was unable to pay the charges; and, therefore, that the patient was indigent within the meaning of the Act.

*National Sanitarium Association v. Town of Mattawa* (1925), 56 O.L.R. 474, and *Toronto Hospital for Consumptives v. Town of Sudbury* (1925), 56 O.L.R. 513, followed.

*Held*, also, that the defendants, by issuing, through their officer, an order to the hospital to admit the patient, had represented that

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he was indigent and that they would be liable for the charges for his treatment; there was no reason why the defendants should not withdraw that representation or cancel the order; but, as the hospital must still treat the patient, the defendants could cancel only if able to prove that the patient was not indigent—the presumption was that the indigence continued, and the onus of displacing the presumption was on the defendants.

- (3) C., an adult, having become ill with tuberculosis, was deported from the United States to Niagara Falls, Ontario. He went on to Toronto, arriving there on the 9th August, 1924, and went directly to the out-patient department of a hospital, where he was found to be so ill that it was deemed necessary to take him in as a patient. He remained there until the 14th September, when he was admitted to one of the plaintiffs' hospitals:—

*Held*, that he had not acquired a residence in Toronto before he was admitted and was not in fact a resident of Toronto at the time of his admission.

It is not the intention of the Act that a person should be able to make a municipality responsible for his maintenance in a hospital merely by going to that municipality. Because C. came to Toronto with a sort of qualified intention of remaining, he did not acquire a residence at the moment of his arrival.

Meaning of "resident" discussed.

Review of the authorities.

*Toronto Free Hospital for Consumptives v. Town of Barrie* (1917), 39 O.L.R. 65, considered and distinguished.

- (4) L. came to Toronto from Thorold on the 15th November, 1924. She was admitted to a hospital in Toronto on the 18th November, and was transferred to one of the plaintiffs' hospitals on the 6th December. Her reason for coming to Toronto was not proven—it was suggested that it was a fair inference that she came for treatment:—

*Held*, that the plaintiffs had not made out their case against the defendants.

- (5) M. was employed at a town in Ontario. He gave up his employment and came to Toronto on the 10th January, 1923, to seek admission to a military hospital. He was not admitted to that hospital, but was admitted to the hospital of one of the plaintiffs at Gravenhurst:—

*Held*, that he had not become a resident of Toronto within the meaning of the Act: his intention was to become an inmate of the military hospital; and, that purpose failing, his stay in Toronto became merely a stay *en route* to the hospital at Gravenhurst. The fact that he abandoned a residence elsewhere to come to Toronto was unimportant.

Actions for the recovery of the plaintiffs' charges for treatment of patients in their respective hospitals.

The actions were tried together by ROSE, J., without a jury, at a Toronto sittings.

J. M. Godfrey, K.C., for the plaintiffs.

G. R. Geary, K.C., for the defendants.

January 2. ROSE, J.:—The hospitals are hospitals "receiving aid" within the meaning of sec. 19 of the Hospitals and

Charitable Institutions Act, R.S.O. 1914, ch. 300. Therefore, they must admit and care for sick persons brought to them while suffering from tuberculosis (secs. 19 and 20); and if a patient admitted is indigent the corporation of the municipality in which he was resident at the time of his admission is liable to the governing body of the hospital for the charges for his treatment (sec. 23). These actions are brought for the determination of questions which have arisen between the plaintiffs respectively and the Corporation of the City of Toronto, concerning the liability of the city corporation in respect of the charges for the treatment of certain patients alleged by the hospitals to be indigent and to have been resident in Toronto at the times of their respective admissions. The *Consentino*, *Lycette*, and *McAleer* cases raise questions as to the residence of the patients at the time of admission. They will be discussed after the other cases have been dealt with, in the order in which they appear in the writs of summons.

*Edna Reesor's case.* This patient was admitted to the Toronto Free Hospital for Consumptives on the 7th September, 1921, on an order from the Medical Officer of Health for the City of Toronto. Periodical reports as to her condition were made by the hospital to the city, and there were periodical renewals by the Medical Officer of Health of his instructions to admit (i.e. to treat) her; but on the 16th January, 1925, the Medical Officer of Health wrote a letter to the hospital cancelling the order as from the 26th January, 1925, on the ground that the patient's father was possessed of means stated in the letter. The patient was still suffering from pulmonary tuberculosis and could not be discharged, and the question is as to the charges for her treatment after the 26th January, 1925.

It is admitted that the patient was 19 years of age at the time of the cancellation of the order, that she has no means of her own, and that her father is not indigent. The father may or may not have good reason for not paying the charges—he was not called as a witness and it is impossible to form any opinion as to that question—but it is not suggested that upon the evidence adduced it could be found that he is liable.

While a parent is under a moral obligation to maintain his infant child, the mere fact that the child is maintained by others with the parent's knowledge and approval does not bring the parent under a legal obligation to those others: *Mortimore v. Wright* (1840), 6 M. & W. 482—see Lord Abinger's remarks at p. 485 with reference to *Nichole v. Allen* (1827), 3 C. & P. 36; and while the existence of the moral obligation makes it easy to

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find an implied promise to remunerate any person who, at the parent's request or with his knowledge, undertakes to discharge the moral obligation for him (*Childs v. Forfar* (1921), 51 O.L.R. 210, *per* Middleton, J., at p. 217), and while there is a disposition to make the finding even when the circumstances do not really warrant it (*Mortimore v. Wright*, 6 M. & W. at p. 486), the evidence in the present case is altogether insufficient to support a finding of a contract by the father. In these circumstances there is, in my opinion, no escape from a finding that the patient is indigent within the meaning of the Act and that the defendants therefore are liable. Indigence being proved, certain general questions raised by Mr. Godfrey as to the right of the defendants to cancel an order, or to cancel an order without being able to prove that the patient is not indigent, do not arise in this case.

*Simeon Goldstein's case.* This patient was admitted to the Weston Sanitarium on the 7th December, 1921, on an order similar to that issued in the *Reesor* case, and the order for treatment was cancelled by the Medical Officer of Health, in his letter of the 6th January, 1925, on the ground that the patient's father was not indigent.

The patient is 10 years of age and has no estate of his own. His father therefore appears to be bound to support him: the Deserted Wives' and Children's Maintenance Act, 1922, 12 & 13 Geo. V. ch. 57, sec. 3; the Criminal Code, secs. 241, 242, 242A; and *Childs v. Forfar*, 51 O.L.R. 210, *per* Riddell, J., at p. 217; and if the defendants pay the charges for treatment they may have a claim against the father: the Hospitals and Charitable Institutions Act, sec. 25—these points, however, cannot be decided in a case to which the father is not a party. But the father gave evidence as to his means and as to the calls upon him, and, while the case is close to the line, my opinion is that, having regard to his resources and to the necessary expenses of maintaining his wife and his other children, he is unable to pay the charges for the patient's treatment (\$10.50 a week), and, therefore, that the patient is indigent within the meaning of the Act: *National Sanitarium Association v. Town of Mattawa* (1925), 56 O.L.R. 474; *Toronto Hospital for Consumptives v. Town of Sudbury* (1925), 56 O.L.R. 513.

Mr. Godfrey, as has been stated, contends that the defendants, having caused the patient to be admitted, are precluded from cancelling the order for admission, and must pay the charges for all treatment supplied while the patient remains in the hospital, whether the patient is indigent or not. I am not prepared to adopt

that view. The situation seems to me to be this: The hospital, if room is available, must take in a sick person who, suffering from tuberculosis, applies for admission; if the applicant is able to pay he comes in as a paying patient; if he is unable to pay, he applies to the city authorities for an order for admission; the defendants, if they issue the order, represent thereby to the hospital that the applicant is indigent and that they therefore will be liable for the charges for his treatment—I am not speaking now of cases in which the Medical Officer of Health has acted under the power purported to be conferred upon him by clause 6 of the Provincial Board of Health's regulations for the control of tuberculosis, that is to say, of cases in which the Medical Officer of Health has ordered the removal of the patient to the hospital so as to protect the health of other persons, to which cases special considerations apply—; so long as the defendants' representation that the patient is indigent stands, the hospital, acting upon it, is entitled to make the defendants pay the charges for treatment; but there appears to be no reason why the defendants should not withdraw that representation (or, to use the language of the letter of the 16th January, 1925, cancel the order); after the representation is withdrawn the hospital must still treat the patient (just as it would have had to do if there had never been an order from the defendants); and if the patient is indigent the defendants must pay the hospital's charges: all that the hospital has lost by the cancellation of the order is the defendants' admission of liability. But Mr. Godfrey contends in the alternative that, if the defendants can cancel the order, they can do so only if able to prove that the patient is not indigent. As to this also I was against him at the trial, but after further consideration I am of opinion that the point is well taken. The defendants have admitted that the patient is indigent; as between the defendants and the hospital the presumption is that the indigence continues: see, e.g., *Brown v. Wren Brothers*, [1895] 1 Q.B. 390; the onus of proof therefore is on the defendants to displace the presumption. This applies in the *Goldstein* case. Regard being had to the statutory obligation of a father to provide necessaries for his child under 16 years of age, Simeon Goldstein can hardly be said to be indigent within the meaning of the Act if his father is able to maintain him in the hospital. The case therefore turns upon the father's state. The hospital alleges that the father is indigent and as against the defendants it makes out a *prima facie* case by proving, by the defendants' admission, that the child was indigent at the time of admission to the hospital. Evidence is given; that evidence, as already stated, discloses a case close to the line; I

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think it is proved that the father is indigent, but if there is doubt about the fact the decision ought to be against the party upon whom the onus rests.

*William Ferguson's case.* This patient left the hospital on the 9th April, 1925; the objection to the bill for the preceding three months is that the patient was well enough to leave and ought to have been discharged. The evidence of Dr. Dobbie proves that the patient was not cured and that it would have been wrong to discharge him. If he had been well-to-do, so that after leaving the hospital he would be well cared for in a comfortable house, there would have been no great reason for his remaining in the hospital; but, having regard to all the circumstances, the humane and proper course was followed. There will be judgment in favour of the hospital for the amount claimed.

*Gladys Sadd's case.* This patient was admitted on an order from the defendants, which order was cancelled because it was supposed by the defendants that the patient's husband was not indigent. The husband cannot be found at present. If a statement that he made to Mr. Reid, the secretary of the Sanitarium Association, was true at the time, and if his earning power and the calls upon him are now what he stated them to be, it would be impracticable for him to pay the customary charge for the maintenance of the patient; and I think he, and consequently the patient, ought to be called indigent for the purposes of the Act. But, whatever the fact may be, the onus of proof is on the defendants, as in the *Goldstein* case, and the defendants are unable to prove that the patient is not indigent. There will be judgment in favour of the hospital.

*Thomas Hill's case.* This patient is allowed a small sum monthly for doing certain easy work in the hospital; and the defendants suggest that being thus in receipt of an income he ought not to be called indigent. But the payment is made to him really as part of his treatment, because it is better for him to earn a little money wherewith to pay for certain things that he has to have than to be given those things; and the money paid to him does not amount to half the charge for his treatment. The patient is, in my opinion, indigent, and there will be judgment in favour of the hospital.

The first of the cases in which the question is whether the patient was resident in Toronto at the time of his admission to the hospital is,



*Samuel Consentino's case.* The patient came to Canada with his father in 1913, being then aged 13. He lived in Fort William and Port Arthur until 1923. In 1918 he joined the Canadian Expeditionary Force, but was discharged. In 1923 he went to the United States. In 1924, having become ill with tuberculosis, he was deported to Niagara Falls, Ontario. At Niagara Falls, he was advised to come to Toronto. He arrived in Toronto on the 9th August, 1924, and went directly to the out-patient department of St. Michael's Hospital. There he was found to be so ill that it was deemed necessary to take him in as a patient. On the 13th August, the defendants' Medical Officer of Health wrote to the medical superintendent of the plaintiffs the Toronto Hospital for Consumptives, stating the facts and asking whether the patient would be admitted to the Toronto Hospital for Consumptives, but not ordering his admission. The patient was admitted on the 14th September. On the 18th September, the plaintiffs notified the defendants that unless the defendants notified the plaintiffs within 14 days that the patient was not a resident of Toronto he would be deemed to be such a resident; and on the 27th September the city clerk notified the plaintiffs that the defendants disclaimed all responsibility. Section 23(4) of the Act, therefore, does not come into operation: the patient is not "deemed" to be a resident of Toronto, and the question in the case is whether he was in fact such a resident at the time of his admission to the plaintiffs' hospital.

The term "resident" is "differently construed in courts of justice, according to the purposes for which inquiry is made into the meaning of the term:" *Mellish v. VanNorman* (1856), 13 U.C.R. 451, 456, cited by Riddell, J., in *Toronto Free Hospital for Consumptives v. Town of Barrie* (1917), 39 O.L.R. 65. There are several cases in which it has been construed for the purposes of the application of the provisions of the Hospitals and Charitable Institutions Act. including the *Barrie* case just mentioned, *Toronto Hospital for Consumptives v. Town of Sudbury* (1925), 56 O.L.R. 513, and *Toronto General Hospital Trustees v. Town of Renfrew* (1925), *ante* 71. But each of these cases is quite distinguishable in its facts from the present case, and in none of the judgments is there anything that is at all decisive of the present case. The *Sudbury* case does serve as an illustration of the fact that a person may acquire residence in a town very soon after his arrival there; but I take it that it may be conceded without greatly advancing the discussion in the present case that in some circumstances residence may be established at the very moment of arrival; and the facts in the *Sudbury* case are so different from

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the facts of the present case that the decision is really of no assistance.

The present is the case of a homeless man. Mr. Godfrey argues that, that being so, the rule applicable is the rule which, as he reads the judgment of Meredith, C.J.C.P., in the *Barrie* case, the learned Chief Justice intended to lay down, viz., that "a person who has no home, or other place of residence, resides wherever he happens to hang up his hat at night." But I cannot follow Mr. Godfrey in the argument that the Chief Justice intended to lay it down that what he refers to as a colloquial dictum is a general rule applicable to all cases which its words will fit. Certainly, it was not necessary for the decision of the *Barrie* case to apply any such rule, and there is nothing in the judgments to indicate that the other members of the Court thought that any such rule existed; and, while the Chief Justice referred to the dictum, I do not understand him to have expressed the opinion attributed to him by Mr. Godfrey; nor do I think that when he said that the child in the *Barrie* case "must have been residing somewhere" he meant that every person must at all times have a residence.

It may perhaps be assumed that when Consentino, having been ejected from his place of "residence" (if he had one) in the United States, and having been landed in Niagara Falls, Ontario, was advised (or instructed) by the municipal authorities at Niagara Falls, to proceed to Toronto, he formed the intention of remaining in Toronto if he could find any one there who could care for him; so that, when he arrived at the out-patient department of St. Michael's hospital, he was willing to become a resident of Toronto if he could. But there is no case that I know of that compels me to hold that, because he came with that sort of qualified intention of remaining, he acquired a residence at the moment of his arrival; and unless there is such a case I am not prepared so to hold. I do not believe that it is the intention of the Act that a person can make a municipality responsible for his maintenance in a hospital merely by going to that municipality: the Act intends to make each municipality responsible for the hospital treatment of such of its indigent residents as are ill; it does not intend, as I read it, to make a municipality provide hospital treatment for every one who, having abandoned his former residence or having no residence to abandon, comes seeking such treatment. And in the present case, if Consentino did not become resident in Toronto as soon as he arrived, I do not think that he acquired a residence before

he was admitted to the plaintiffs' hospital. St. Michael's hospital is not a hospital for the treatment of persons suffering from tuberculosis; but Consentino was so ill that he could not be sent away until arrangements had been made for his reception elsewhere; and it seems to me that merely by helping him pending the completion of those arrangements, whether a day or a month elapsed, the managers of St. Michael's hospital did not establish him as a resident. His position at St. Michael's hospital was quite different from the position of the girl in the *Barrie* case. That girl was the ward of a society which decreed that she should live in Barrie, at first in the shelter maintained by the society and later in houses in which she was employed, and naturally the Court held that residence in Barrie had been established. But Consentino was not kept in St. Michael's hospital for any similar reason; he was there, so to speak, in transit to one of the hospitals maintained by the plaintiffs or to another institution charged with the care of persons afflicted with tuberculosis; and, while it is true that the kind of intention that is necessary to the establishment of a domicile is not an essential to the establishment of a residence, I do not think that for the purposes of the Hospitals and Charitable Institutions Act any stay so essentially temporary as Consentino's stay in Toronto can suffice to establish a residence. In ordinary conversation the expression "resident in Toronto," I think, would not have been used to describe Consentino while he was an inmate of St. Michael's hospital; and probably effect will be given to the intention of the legislature if the word "resident" is given the meaning that is usually given to it in conversation. For these reasons, I am of opinion that the plaintiffs' claim fails.

*Isabella Lycette's case.* This patient seems to have come to Toronto from Thorold on the 15th November, 1924, to have been admitted to St. Joseph's hospital on the 18th November, and to have been transferred to one of the plaintiffs' hospitals on the 6th December. Her reason for coming to Toronto is not proven; but the defendants suggest that it is a fair inference that she came for treatment.

In my opinion, the plaintiffs have not made out their case.

*Walter McAleer's case.* McAleer was employed by a railway company at MacTier. He gave up his position, and on the 10th January, 1923, on advice of some friends, he came to Toronto to seek admission to the Christie street military hospital. After he had been examined at that hospital, he was informed that he could

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not there receive suitable treatment, and he was referred to the Gage Institute, which sent him to one of the plaintiffs' hospitals, to which he was admitted on the 24th February, 1923. I do not think it is established that he had become resident in Toronto within the meaning of the Act. The only distinction between this case and *Consentino's* is that McAleer abandoned a residence in MacTier to come to Toronto, whereas it is not shewn clearly that Consentino before coming to Toronto had a residence anywhere; and this, I think, is an unimportant distinction. The dominant fact, in my opinion, is that McAleer's intention in coming to Toronto was to become an inmate of the Christie street hospital if possible, and that that purpose failed and his stay in Toronto became merely a stay *en route* to the plaintiffs' hospital at Gravenhurst.

There will be judgment in favour of the plaintiffs the Toronto Hospital for Consumptives for \$327.50, the amount claimed in the *Reesor*, *Goldstein*, and *Ferguson* cases, and in favour of the National Sanitarium Association for \$423, the amount claimed in the *Sadd* and *Hill* cases. In each action, following the discussion at the trial, there will be an order for costs on the Supreme Court scale. As I understand it, vouchers have been issued for the amounts agreed upon in the cases in which liability was admitted,\* and there is no need for a judgment; but if there is any misapprehension as to this the matter may be mentioned to me before the formal judgments are issued.

\*Certain claims in respect of other patients were abandoned or settled or admitted at the trial. These claims are referred to in the reasons for judgment as delivered, but the references to them are omitted from the report.

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[GRANT, J.]

## CITY OF TORONTO V. TORONTO RAILWAY CO.

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*Interest—Money Paid into Court—Loss of Difference between Rate Allowed by Court and Legal Rate—By whom Borne—Order of Court Allowing Municipality to Take Possession of Railway—Payment into Court Made Term of Order—Vendor and Purchaser Rule as to Interest—Application to Compulsory Purchase under Statutory Powers—Effect where Chattels as well as Real Property Concerned—Purchase of Railway as Going Concern—Ontario Judicature Act, sec. 34—Appropriation of Sum Paid in—Whether such as to Relieve from Liability—Opportunity to Invest Money in Court at higher Rate—Agreement between Parties—Confirmatory Act, 55 Vict. ch. 99, sec. 4(3)—Language of Order for Payment in.*

The day fixed for the taking over by the plaintiff city corporation of the defendant company's railway and other property and effects, in pursuance of an agreement made on the 1st September, 1891, confirmed by 55 Vict. ch. 99 (Ont.), was the 1st September, 1921. On the 25th August, 1921, the amount of the compensation to be paid by the plaintiff corporation not being ascertained, an order was made by a Judge of the Supreme Court of Ontario providing that the plaintiff corporation, upon paying the defendant company \$1,000,000 and paying into court \$500,000, "to abide the event of the arbitration pending between the parties," should be at liberty to take possession of the railway and other property. The terms of the order were complied with and possession was taken. The arbitration proceeded, and an award was made on the 30th January, 1923. There was an appeal from the award to the Appellate Division and a further appeal to the Privy Council; and the amount due by the city corporation was not paid until the 16th December, 1924. The money paid into court bore no interest for the first 6 months, and thereafter bore interest at 2 per cent. per annum only:—

*Held*, that the plaintiff corporation should suffer the loss of the difference between 2 per cent. per annum and 5 per cent., the legal rate.

As between vendor and purchaser, where the purchaser takes possession of the property purchased before payment of the purchase-money, he must pay to the vendor interest upon the purchase-money from the time of taking possession until the time of payment; and that general principle also governs cases of compulsory purchase under statutory powers.

The chattel property purchased by the plaintiff corporation was an integral part of the railway which had been operated by the defendant as a going concern and continued to be so operated by the plaintiff corporation after the 31st August, 1921; the purchase was a purchase of the railway as a whole with all its property as a part of that going concern; and the general principle referred to was applicable.

Review of the authorities.

*Swift & Co. v. Board of Trade*, [1925] A.C. 520, distinguished.

The provisions of Lord Tenterden's Act, 3 & 4 Wm. IV. ch. 42, sec. 8, are much more limited in their scope than those of sec. 34 of the Ontario Judicature Act.

An appropriation of money to operate in relief of the purchaser from his obligation to pay interest must be of such a nature, and must be made in such circumstances, as will render the money available to the vendor, upon fulfilment by him of his obligation in respect of the sale, the completion of which is being delayed by him or on his



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account; and the payment into court of the \$500,000 was not such an appropriation as would relieve the plaintiff corporation of its liability for interest.

Review of the authorities.

*In re Clarke and Toronto Grey and Bruce Railway Co.* (1909), 18 O.L.R. 628, 633, 635, 636, 637, specially referred to.

The fact that the defendant company had an opportunity, in 1921, to consent to the investment of the money paid into court in interest-bearing securities, and failed to give such consent, did not deprive the company of its right to interest beyond what the money earned in court—no principle of law or equity compels a defendant, in these circumstances, to agree or refuse to agree to such an investment.

Consideration of the provisions of sec. 4(3) of 55 Vict. ch. 99 and of the language of the order of the 25th August, 1921.

ACTION brought to recover the sum of \$53,901.13, in the circumstances mentioned below.

November 23 and 27, 1925. The action was tried by GRANT, J., without a jury, at a Toronto sittings.

W. N. Tilley, K.C., and G. R. Geary, K.C., for the plaintiff corporation.

The Hon. N. W. Rowell, K.C., and Frank McCarthy, for the defendant company.

January 7, 1926. GRANT, J.:—This action arises out of the taking over, at midnight, on the 31st August, 1921, of the Toronto Railway with the property and assets used in connection with it as a going concern.

By agreement bearing date the 1st September, 1891, confirmed by legislation of the Province of Ontario (55 Vict. ch. 99), the plaintiff corporation had the right at the expiration of the franchise of 21 years, subsequently extended by another 10 years by the legislation referred to, to take over the defendant company's street railway, in Toronto, at a price to be determined by arbitration.

The agreement, to which is appended a document intituled "The Award, Conditions, Tender, and By-law," and also copies of the legislation, are to be found in a pamphlet filed as exhibit 1.

Pursuant to the provisions of sec. 4, subsecs. 1 and 2, of the statute, the plaintiff corporation gave the necessary 12 months' notice to the defendant company of its intention to take over the street railways and property and assets used therewith, on the 1st September, 1921.

Owing to the existence of doubt upon the point, an amendment to the statute was passed and assented to on the 3rd May, 1921 (11 Geo. V. ch. 126, sec. 11), the material part of which provided

that the arbitration was to be conducted by three arbitrators. After the passing of this amendment, the parties appointed their respective arbitrators, who, in turn, selected an umpire. The arbitration was commenced in the early summer of 1921, and then adjourned until September of that year. Charges and counter-charges of responsibility for delay in proceeding with the arbitration were made by both parties before me. As the arbitrators could not have been appointed until after the 30th April, 1921, the date when assent was given to the statutory amendment, in view of the time when the arbitration was commenced, and the fact that the arbitration was not completed, with publication of the award, until the 30th January, 1923, I do not attach any importance to the charge of delay.

Subsection 3 of sec. 4 of the statute of 1892 reads, in part, as follows:—

“After the said City of Toronto shall have given notice of its intention to take over the said property, it may at once proceed to arbitrate under the conditions in that behalf, and both the City and the purchasers or the Company, as the case may be, shall in every reasonable way facilitate such arbitration, and the arbitrators appointed in the matter shall proceed so as, if possible, to make their award not later than the time named by the City for taking over the said property. But if from any cause the award shall not be made by such time or if either party be dissatisfied with the award, the City may nevertheless take possession of the said railways and all the property and effects thereof real and personal necessary to be used in connection with the working thereof on paying into court either the amount of such award, if the award be made, or if not upon paying into court or to the purchasers or Company, as the case may be, such sum of money as a Judge of the High Court of Justice may after notice to the opposite party order and upon and subject and according to such terms, stipulations and conditions as the said Court shall by its order direct and prescribe, Provided always that the rights of the parties except in so far as herein specially provided shall not be affected or prejudiced thereby. . . .”

By sec. 22 the railway company was empowered to issue bonds, debentures, or other securities.

Purporting to act under subsec. 3 of sec. 4, above quoted, the award not having as yet been made, the city corporation applied to Latchford, J. (now Latchford, C.J.), for an order permitting the city corporation to take possession of the street railway property and assets on the night of the 31st August. On the 25th

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August, 1921, an order was made upon the motion of the city corporation (exhibit 2), which was intituled: "In the matter of the purchase by the Corporation of the City of Toronto of the property necessary to be used in the working of the Toronto Railway Company. And in the matter of the pending arbitration between the Toronto Railway Company, claimant, and the Corporation of the City of Toronto, contestant."

The part of the order material to this inquiry follows:—

"1. This Court doth order that upon the said Corporation of the City of Toronto paying to the Toronto Railway Company the sum of \$1,000,000 and paying into court, to the credit of this matter, the sum of \$500,000, to abide the event of the arbitration pending between the parties, it shall be at liberty to take possession of the railway of the Toronto Railway Company and all the property and effects thereof, real and personal, necessary to be used in connection with the working of the said railway immediately upon the expiration of the 31st day of August, 1921, pursuant to clause 3 of section 4 of the Act 55 Victoria chapter 99 (Ontario) and amendments.

"2. And this Court doth further order that the said City of Toronto shall be entitled to credit upon the amount payable by it to the Toronto Railway Company as the purchase-price, as the same may be ascertained in the above mentioned arbitration, the sum of \$1,000,000, being part of the amount due and payable by the said railway company to the said city in respect of percentages due and accruing under the terms of the agreements and conditions referred to in the aforesaid statute.

"The aforesaid sum of \$1,000,000, being part of the amount so payable, shall be credited upon the said purchase-price and percentages as of the said 31st day of August, 1921, but without prejudice to the counterclaim of the said Toronto Railway Company in the action pending in respect of such percentages and without prejudice to the lien of the city upon the assets of the Toronto Railway Company in respect of the balance now owing and accruing due from the Toronto Railway Company to the City of Toronto in respect of such percentages."

The city corporation paid to the railway company the sum of \$1,000,000 and paid into court the further sum of \$500,000, and at midnight on the 31st August, 1921, took possession of the street railway as a going concern, and from that time forward the street railway was operated by or on behalf of the city corporation.

The arbitrators' award (exhibit 3) was published on the 30th January, 1923, the amount payable by the city corporation being

fixed at \$11,188,500. The arbitrators further awarded that interest should be paid by the city corporation to the company upon the said sum, at the legal rate of 5 per cent. per annum, from the date of the taking of possession, the 31st August, 1921, to the date of the award, the 30th January, 1923.

As the result of appeals to a Divisional Court of the Appellate Division (*Re City of Toronto and Toronto Railway Co. (No. 2)* (1923), 54 O.L.R. 561) and the Judicial Committee of the Privy Council (*Toronto City Corporation v. Toronto Railway Corporation*, [1925] A.C. 177), subject to certain minor changes the award was upheld except that it was decided by both appellate tribunals that the arbitrators had not jurisdiction to deal with the matter of interest, and the award of interest was stricken out.

On or about the 16th December, 1924, by adjustment of accounts between the parties, a settlement was made and the balance due was paid over by the city corporation to the railway company, including interest at the legal rate of 5 per cent. from the 31st August, 1921. By agreement between the parties, the payment of interest in respect of the \$500,000 paid into court was made without prejudice to the rights of the parties in respect thereof.

The \$500,000 paid into court under the Rules of Court bore no interest for the first 6 months, and thereafter bore interest at 2 per cent. per annum only. This action has been brought to determine which of the two parties should suffer the loss of the difference between the 2 per cent. per annum and 5 per cent. per annum, the legal rate, upon the money paid into court, the amount of which loss has been agreed by counsel to be \$53,901.13.

The city corporation alleges that on or about the 20th September, 1921, the Accountant of the Supreme Court of Ontario wrote to the railway company, as well as to the city corporation, suggesting that the moneys in court, viz., the \$500,000, should be invested in interest-bearing securities with a view to increasing the interest which would be earned by the amount; that it further expressed its willingness to adopt such suggestion, but that the defendant refused to consent thereto; and that, had not the defendant refused its consent, interest as high as the legal rate could readily have been obtained, and there would, therefore, have been no loss sustained.

In answer the defendant alleges that there was no definite proposal submitted to it as to the investment of the \$500,000; that all the negotiations that took place with reference to the question of investment were without prejudice; and that in any event neither the acceptance nor rejection of any such proposal could

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add to or take away from the legal rights of the parties on the question of interest.

The defendant also pleads that on the return of the motion before Latchford, J., on the 25th August, 1921, the defendant asked, as a term of the order sought by the plaintiff, payment to the defendant of the sum of \$5,250,000; that the plaintiff objected to any payment being made to the defendant; and that the order, when issued, directed payment to the defendant of \$1,000,000 and payment into court of \$500,000 to abide the event of the arbitration. The defendant pleads further that under the agreement and statutory provisions the defendant was entitled to be paid the amount of the award with interest from the time of the taking of possession, viz., the 1st September, 1921, to the date of the payment, and that the defendant had no further interest thereafter in respect of the \$500,000 paid into court.

The general principle governing the question of liability for interest as between vendor and purchaser appears to be well settled, viz., that the purchaser who takes possession of the property purchased before payment of the purchase-money must pay to the vendor interest upon the purchase-money, or so much thereof as remains unpaid, from the time of the taking of possession until the time of payment. A court of equity in such a case deems the purchaser to be the owner of the purchase-money; the purchaser in possession not being required to account to the vendor for the rents and profits received from the property, but being required to pay the vendor interest upon the unpaid purchase-money until it is paid over to the vendor.

For a summary of the rules deduced from the decided cases bearing upon the question under consideration, reference may be had to Cripps' Law of Compensation, 5th ed., pp. 128, 129, and also to Dart on Vendors and Purchasers, 7th ed., vol. 1, pp. 651-3, and pp. 658-9.

This principle has been held also to govern cases of compulsory purchase under statutory powers, e.g., *In re Pigott and Great Western Railway Co.* (1881), 18 Ch.D. 146, a decision of Jessel, M.R. The leading case invariably cited as authority for the general principle is *Birch v. Joy* (1852), 3 H.L.C. 565, and particularly at p. 591 (St. Leonards, L.C.) A decision in our Courts upon the general principle and one in which the authorities are reviewed, is to be found in *Toronto General Trusts Corporation v. White* (1902), 3 O.L.R. 519, at p. 524, and, in appeal, 5 O.L.R. 21, at pp. 25 *et seq.*

Whether, therefore, the city corporation in taking possession

acted under statutory powers or under the provisions of an agreement, or a combination of both, does not affect the liability of the city corporation to pay interest at the legal rate from the time of the taking of possession.

It was contended by counsel for the plaintiff corporation that the principle enunciated had no application to the case of a purchase of chattel property, and, therefore, as some portion of the property taken over by the plaintiff corporation in the present case consisted of personalty, the principle should not be applied in the case at bar.

Counsel cited the case of *Swift & Co. v. Board of Trade*, [1925] A.C. 520. The facts of that case material for the present inquiry are as follows. By one of the Defence of the Realm Act Regulations the Food Controller was authorised to make orders regulating the sale or purchase of any article for the purpose of maintaining the food supply of the country and to requisition any article or any stocks thereof; in default of agreement, the compensation to be paid was to be determined by arbitration. The regulation in question went on to direct how the amount of compensation was to be ascertained. By an order of the 6th August, 1919, the Food Controller prescribed maximum prices for the sale of bacon, ham, and lard, and by an order of the 8th August, 1919, the Food Controller required every owner of any bacon, ham, or lard which might thereafter be discharged from ship in England to place the same at the disposal of the Food Controller. Under this order large stocks of bacon, ham, and lard, belonging to Swift & Co., a United States firm, on arrival in England were placed at the disposal of the Food Controller, and the question of compensation was referred to arbitration. The decision of the Court upon the question of interest was to the effect that the arbitrator was not entitled to allow interest on the amount of the compensation from a date anterior to the final award. Viscount Cave, L.C. deals with the question of the liability of the Board of Trade to pay interest, in the following manner (pp. 532, 533):—

“Upon the question of interest I am of opinion that the view taken by the majority of the Court of Appeal is right. It is true that on a contract for the sale and purchase of land it is the practice of the Court of Chancery to require the purchaser to pay interest on his purchase-money from the date when he took, or might safely have taken, possession of the land: see *Birch v. Joy*; but this practice rests upon the view that the act of taking possession is an implied agreement to pay interest: *per* Sir W. Grant in *Fludyer v. Cocker* (1805), 12 Ves. 25, 27. It is true also that

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the rule has been extended to cases of compulsory purchase under the Lands Clauses Consolidation Act, 1845: *In re Pigott and Great Western Railway Co.*, 18 Ch.D. 146; *Fletcher v. Lancashire and Yorkshire Railway Co.*, [1902] 1 Ch. 901; but this is because the notice to treat under the statute is treated in equity as creating the relation of vendor and purchaser. No doubt the rule is well established in the case of sales of land; but there is no authority in English law for applying it to a requisition of goods by the State, and there appears to be no sufficient reason why in such a case the provisions of Lord Tenterden's Act should not apply. The right of the owner of goods requisitioned under reg. 2 F is to have compensation for the goods determined by arbitration and paid, and until the amount of the compensation has been so determined there is no sum certain payable to the owner upon which interest can run. To hold otherwise is to give compensation, not for the goods themselves, but for the time occupied in ascertaining their value in accordance with the law. The decisions in *London Chatham and Dover Railway Co. v. South Eastern Railway Co.*, [1893] A.C. 429, and *In re Richard and Great Western Railway Co.*, [1905] 1 K.B. 68, are in point."

It is to be noted that the Lord Chancellor states that there is no authority in English law for applying the general rule as to liability for interest to the requisition of articles and goods by the State, and also that in his judgment there did not appear to be any sufficient reason why in such a case (that is, a case of requisition of goods by the State) the provisions of Lord Tenterden's Act should not apply.

The provisions of Lord Tenterden's Act are not as extensive as the provisions of sec. 34 of the Judicature Act, R.S.O. 1914, ch. 56, which reads as follows: "Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it."

The difference between this provision and the provision of Lord Tenterden's Act is pointed out by Lord Macnaghten in *Toronto Railway Co. v. Toronto Corporation*, [1906] A.C. 117, at p. 120. Decisions of our Court are referred to in which it is stated to be the settled practice in this Province "to allow interest on all accounts after the proper time of payment has gone by."

In the *Swift* case, Cave, L.C., refers to two decisions which are stated by him to be in point. The first is *London Chatham and Dover Railway Co. v. South Eastern Railway Co.*, [1893] A.C. 429, in which it was held, affirming the decision of the Court of Appeal, "that no interest could be recovered under 3 & 4 Wm. IV. ch. 42,



sec. 28 (Lord Tenterden's Act); since there was 'no debt or sum certain payable by virtue of a written instrument at a certain time,' within the meaning of that statute: nor had any demand of payment claiming interest been made in writing: and that interest could not be given by way of damages for detention of the debt, the law upon that subject, unsatisfactory as it is, having been too long settled to be now departed from."

It is apparent on perusal that the case then under consideration differed essentially from the case at bar, and also that the provisions of Lord Tenterden's Act are much more limited in their scope than sec. 34 of the Judicature Act.

The other case cited by Cave, L.C., in *Swift & Co. v. Board of Trade*, is *In re Richard and Great Western Railway Co.*, [1905] 1 K.B. 68. That was a case in which by virtue of certain powers given by statute, the railway company, by following certain procedure, was enabled to prevent mine-owners from operating their mine or extracting minerals because they were subjacent to the railway lines. For this the law gives compensation, the amount thereof to be fixed by arbitration. There was no sale, and no change of title or ownership of property, and it was held that interest should not be allowed from the time the notice was given by the railway company. It will be seen at once that it was not a case of vendor and purchaser, either voluntary or under statutory compulsion, and that the essential foundation upon which a court of equity based the implied agreement to pay interest was not present. See for this distinction the remarks of Collins, M.R., at the bottom of p. 71 of the report, and later in his reference to a distinction of the decision of Buckley, J., in *Fletcher v. Lancashire and Yorkshire Railway Co.*, [1902] 1 Ch. 901, which involved a sale and the relation of vendor and purchaser (under compulsory powers) and in which there was held by the Court to be an implied obligation to pay interest from the date of the notice, which was taken to be equivalent to the taking of possession. See also in *In re Richard and Great Western Railway Co.* (*supra*) the language of Stirling, L.J., at pp. 72, 73, and his quotation from the decisions of the Lord Chancellor and Lord Macnaghten respectively, and also the language of Lord Justice Mathew at p. 73. It is interesting to note that in the *Fletcher* case notice was given by the company in November, 1892, and the arbitrator was not appointed until 1897, and the mine-owner was held to be entitled to interest from November, 1892, on the amount of compensation awarded by the arbitrator.

In the matter now before me it appears to me that the chattel

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property, whether a major or minor part of that which was purchased by the plaintiff corporation, was an integral part of the street railway which had been (by the defendant) operated as a going concern and continued to be so operated by the plaintiff corporation after the 31st August, 1921; and that the purchase was a purchase of the railway as a whole with all its property as a part of that going concern, subject to the right (if any) of the city corporation, within the limited time, to reject certain items or portions of the property.

Reading the decision in *Swift & Co. v. Board of Trade* in the light of the special facts of that case, and in the light of the authorities which were therein cited, as supporting the decision, I have reached the conclusion that it is not applicable to the case at bar.

I am fortified in this view by opinions expressed in the reasons for judgment of the First Divisional Court on the appeal from the arbitrators in respect of the present subject-matter, *Re City of Toronto and Toronto Railway Co.*, 54 O.L.R. 561; also by an expression of opinion contained in the decision of Viscount Cave, L.C., in the appeal taken from the Appellate Division and reported under the name *Toronto City Corporation v. Toronto Railway Corporation*, [1925] A.C. 177.

At the bottom of p. 567 of the report of the case in 54 O.L.R., Hodgins, J.A., citing English and Ontario authorities, uses the following language: "*Interest*. In view of the fact that possession was taken of all the property of the railway company, and that the city has received whatever profits accrued by the operation of the railway, it would seem equitable that interest should be paid from the time of taking possession." His Lordship goes on to state that the arbitrators had no authority to include interest in their award, as that was a matter upon which the Court, and not the arbitrators, should adjudicate.

In the reasons for judgment of the Judicial Committee in [1925] A.C. at p. 193, and also part of p. 194, the following language is used by the Lord Chancellor in delivering the judgment of the Committee: "The company claimed that the award of the arbitrators, so far as it allowed interest on the value of the property taken over from the date of the award, should be restored. Upon this point their Lordships agree with the view taken by the Supreme Court. The general rule under which a purchaser who takes possession is charged with interest on his purchase-money from that time until it is paid, is well established, and has on many occasions been applied to compulsory purchase; and their Lord-

ships are not aware of any circumstances which would prevent that principle from applying in the present case. But the duty of the arbitrators in this case was not to determine all the rights of the company, but only to ascertain the actual value of certain property at a certain time; and it is a truism to say that such value cannot include interest upon it. The liability for interest depending upon the principle stated lies outside of the arbitration for its enforcement."

It is also of interest to note that in the settlement of accounts between these parties in December, 1924, interest was allowed by the plaintiff to the defendant upon the entire unpaid portion of the purchase-price at 5 per cent. per annum from the time of the taking of possession, the only question left to be determined being that now before me for decision, viz., which party shall bear the loss of the difference in interest in respect only of the \$500,000 (see exhibits 18 and 22).

Upon the plaintiff's contention that, for the reason that a portion of the property and assets taken over consisted of personalty, the principle fixing liability for interest did not apply, my decision is in favour of the company.

Counsel for the plaintiff corporation further contended that the payment into court was an appropriation by the city corporation of the amount paid, and that, therefore, upon authority, the defendant company would be entitled only to such interest as the money might earn in court. In support of this contention, counsel for the plaintiff corporation cited the following authorities: *Re Lea and Ontario and Quebec Railway Co.* (1885), 21 C.L.J. 154, a decision of Galt J.; also *Re Taylor and Ontario and Quebec Railway Co.* (1886), 11 P.R. 371, a decision of O'Connor, J.; and also *Re Philbrick and Ontario and Quebec Railway Co.* (1886), 11 P.R. 373 (approximately following the *Taylor* case), a decision of the late Chancellor Boyd. These were all decisions of cases arising under the provisions of sec. 9, subsec. 28, of the Consolidated Railway Act of Canada, 1879. It may be noted in passing that these cases are cited in the first edition of the text-book of MacMurchy and Denison on the Canadian Railway Act, at p. 236, as authority for this proposition; and that in the second edition of the text-book, which was issued after the decision in the *Clarke* case (referred to below) these cases are again cited, at p. 255 (and supported by argument); and that in the third edition (1922), at p. 337, the authors no longer mention the three cases cited by counsel for the city corporation, but cite only the decision of the late Chief Justice of Ontario, Sir William Meredith, in the case

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of *In re Clarke and Toronto Grey and Bruce Railway Co.* (1909), 18 O.L.R. 628.

In that case I would refer particularly to the remarks of the late learned Chief Justice of Ontario at the bottom of p. 633, his quotation from Fry on Specific Performance, at the middle of p. 635, and his own views expressed on pp. 636, 637. Peculiarly appropriate are his references to the fact that the payment into court was for the benefit of the railway company, which desired in advance to obtain possession of the property, and the injustice of compelling the property-owner to accept the low rate of interest from the time of the payment into court, in view of the fact that his property had been taken from him, and he was deprived of its enjoyment from the date of the taking of possession. I adopt, with great respect, the comment of the late lamented Chief Justice upon the then unsatisfactory state of the law by which the mere appropriation of the purchase-money had been held to prevent interest from running, and I appropriate for use here his quotation from Dart on Vendors and Purchasers, 7th ed., p. 658, where that learned writer, referring to reported decisions, states that "it is believed that these authorities have not been followed in unreported cases by eminent Judges." The late Chief Justice then proceeds (18 O.L.R. at p. 636): "Agreeing, as I do, with the view thus expressed" (that of Dart), "I am not disposed to extend the application of the rule or supposed rule beyond what is covered by decided cases which it is my duty to follow." He then proceeds to distinguish the *Lea*, *Taylor*, and *Philbrick* cases, and decides that in the case before him, the owner, Clarke, was entitled to be paid out of the moneys in court the amount of compensation awarded to him, with interest at 5 per cent. per annum from the date of the warrant of possession, and he gives costs against the railway company.

*Sinclair v. Great Eastern Railway Co.* (1870), L.R. 5 C.P. 391, is a case in which there is involved the question of the right to interest upon an amount paid into court. The Court there held that, notwithstanding the payment into court, the plaintiff was entitled to be paid interest down to the time when he could have taken the money out of court, but not after such time.

This decision was followed in our Courts in *Powell v. Peck* (1886), 12 O.R. 492, and (1888) 15 A.R. 138, at the foot of p. 149, where importance is attached to the fact that (as in the case at bar) the money could not be taken out by the mortgagee.

In the case at bar, the city corporation desired to take possession of the railway property, before paying for it; it made applica-



tion to the Court for an order permitting it to do so; it resisted the defendant company's request for a large payment to the defendant on account of the purchase-price (not yet ascertained), it obtained possession of the property, and continued thereafter in the enjoyment of it; and, instead of paying the \$500,000 to the defendant, it paid that sum into court (knowing the consequences in regard to interest therein, and without obtaining any relief, in the court order, against its liability for interest from the time of possession taken), where it was of no value whatever to the defendant except possibly by way of security.

A careful consideration of the authorities leads me to the conclusion that an appropriation of money to operate in relief of the purchaser from his obligation to pay interest must be of such a nature, and must be made under such circumstances, as will render the money available to the vendor, upon fulfilment by him of his obligation in respect of the sale, the completion of which is being delayed by him or on his account. *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575, affords an illustration of a state of facts in which appropriation avoided liability for interest. No such state of facts exists here.

Whether my conclusion be correct or not, I am of opinion that the payment into court of the \$500,000, in the present case, is not, under the authorities, such an appropriation as will relieve the plaintiff corporation of its liability for interest. The city corporation was perfectly good for the amount which might be awarded by the arbitrators. If effect were given to the city corporation's contention, the railway company would have been better off if the city had kept the money instead of paying it into court, because there would then have been no question of the city's obligation to pay interest upon it.

Counsel for the plaintiff urged upon me that, inasmuch as the defendant had an opportunity, in the autumn of 1921, to consent to the investment of the money in interest-bearing securities, and failed to give such consent, therefore the defendant is, or ought to be, deprived of its right to any interest beyond what the money earned in court. For some period of time the money in court was covered by a notice, and later by a stop-order, given and granted respectively on behalf of the bondholders of the defendant company.

Apart from this feature of the matter, I do not know of any principle of law or equity which compels a defendant, under these circumstances, to agree or refuse to agree to such investment. The money was in court because the city corporation would not pay it to the railway company, which needed it. It is not a case of an

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injured party being required to minimise his loss or damage. This is clearly a case in which, if there be any liability for interest at all, it is by reason of the implied contract by a purchaser to pay interest on the purchase-money from the time of his taking possession of the property. *Vide* Cave, L.C., in *Swift & Co. v. Board of Trade*, [1925] A.C. at p. 532, citing Sir W. Grant in *Fludyer v. Cocker* (1805), 12 Ves. 25, 27.

That being so, there is here nothing which gives the Court any justification for depriving the defendant of its contractual rights.

Before concluding my reasons for the decision, it may be useful to refer for a moment to the language of the order made by Latchford, J. (exhibit 2), and to the statutory provision under which such order was made. Under sec. 4, subsec. 3, of the special Act, the city was empowered to take possession of the railway and all the property and effects thereof, on "paying into court or to the purchaser or Company, as the case may be, such sum of money as a Judge of the High Court may after notice to the opposite party order and upon and subject and according to such terms, stipulations and conditions as the said Court shall by its order direct and prescribe, Provided always that the rights of the parties except in so far as herein specially provided shall not be affected or prejudiced thereby."

The rights of the parties are not to be affected or prejudiced "except in so far as herein specially provided." That apparently means except as in the statute provided or presumably in the order authorised by the statute to be made. The rights of the railway company would, therefore, remain unaltered save in so far only as they may have been altered by statute or by the order granted thereunder. Any such alteration, in my opinion, must come by express provision or necessary implication.

The statute, as I read it, contains no language or expression from which can be (much less must be) implied any alteration or diminishing of the right to interest.

The order, in para. 1 provides for the payment of \$1,000,000 to the railway company, and upon the authorities there would be no interest allowed upon the sum so paid. It provides further for the payment into court "to the credit of this matter" of \$500,000 "to abide the event of the arbitration pending between the parties;" and further that the city corporation should then be at liberty to take possession of the "railways, the property and effects thereof," etc. The order does not state for what purpose the \$500,000 is paid into court. The order makes a distinction between the \$1,000,000 paid to the railway company, and upon which

therefore no interest would thereafter accrue, and the \$500,000 paid into court. There is nothing in the order stating whether the \$500,000 was paid in as security or as a part of the compensation, and a perusal of the cases in which the expression "to abide the event" is used and interpreted has not given me any help in its interpretation. As already stated, the payment of this amount into court was of no practical value to the railway company, and as the order affords no clue to the reason for the payment in, and contains no provision for its payment out to the railway company, I conclude that, in view of all the circumstances, the payment in must have been intended to be in the nature of a security, given for the carrying out of the award, or something of that nature.

The further provision of the order contained in the latter part of para. 2 is of interest. In para. 2 provision is made that the city corporation shall be entitled to credit upon the amount payable by it to the railway company, as the purchase-price, for the sum of \$1,000,000 in respect of percentages due and accruing due; and this paragraph proceeds, "*the aforesaid sum of \$1,000,000, being part of the amount so payable, shall be credited upon the said purchase-price and percentages as of the said 31st day of August, 1921.*" The order in this instance does expressly provide that the sum of \$1,000,000 "shall be credited upon the said purchase-price . . . as of the said 31st day of August, 1921," making a clear distinction between this sum and the \$500,000 paid into court, which latter sum is not required to be credited either then or at any other time. Also it follows, as of necessary implication, that the interest which would otherwise accrue upon the \$1,000,000, in consequence of the provision for the immediate credit thereof, would not accrue from that time forward.

My conclusion is that the provisions of the statute and the language of the order of Latchford, J., are favourable rather to the position of the defendant than to the position of the plaintiff.

My decision therefore is that the action of the city corporation against the railway company must be dismissed and with costs.

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## [IN BANKRUPTCY.]

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## RE HUDSON FASHION SHOPPE LTD.

*Bankruptcy—Application for Leave to Appeal to Supreme Court of Canada—Extension of Time for Making—Jurisdiction of Judge in Bankruptcy—Discretion—Bankruptcy Act, secs. 2(1), 64(3), 68(5), 74(3), 84—Bankruptcy Rule 72.*

The Judge authorised under sec. 64(3) of the Bankruptcy Act to exercise jurisdiction in Bankruptcy in Ontario is "the court" invested with original jurisdiction in Bankruptcy under the Act (sec. 2(1); and that court has a discretionary power, under sec. 68(5) of the Act, to extend the time for applying for leave to appeal, under sec. 74(3) of the Act and Bankruptcy Rule 72, to the Supreme Court of Canada from a judgment of the "Appeal Court" of Ontario.

And, where there was a *bonâ fide* intention to appeal, manifested by the service of a notice within the 30 days allowed by Rule 72, and a motion made to a Judge of the Supreme Court of Canada for leave to appeal, which was dismissed because the notice given to the opposite party was too short, and the question involved in the proposed appeal was an important one, the discretion of the Judge in Bankruptcy was exercised (having regard to the provisions of sec. 84) by extending the time for applying for leave.

*McBride v. Ontario Jockey Club* (1925), *ante* 267, and *In re Gilbert* (1925), 5 C.B.R. 790, distinguished.

APPLICATION by the trustee in bankruptcy of the estate of Hudson Fashion Shoppe Ltd. for an order extending the time for applying to a Judge of the Supreme Court of Canada for leave to appeal from the judgment of the Appellate Division, *ante* 130, and staying execution until after the disposition of the application for leave to appeal.

January 13. The application was heard by FISHER, J.

*H. J. McDonald*, for the applicant.

*S. J. Birnbaum*, for the Royal Dress Company, respondents.

January 19. FISHER, J.:—Notice of motion to the Supreme Court of Canada for leave to appeal was served on the 17th December, 1925, returnable on the 31st December, 1925.

When the motion came on for hearing before the learned Chief Justice of Canada, objection was taken by opposing counsel that 14 days had not elapsed between the service and the return of the motion, as provided by Bankruptcy Rule 72, and the motion was dismissed without any consideration as to the merits. The order of dismissal was without prejudice "to the right, if any, of the applicant to obtain an extension of time for the making of such application, or for the service of a notice thereof, from the court having jurisdiction to grant such extension, and without prejudice to the

right of the said applicant to renew the said application to the Supreme Court of Canada for leave to appeal from the judgment of the Appellate Division of the Supreme Court of Ontario, in the event of such extension being granted by the Court aforesaid."

Section 74(3) of the Bankruptcy Act reads: "The decision of the Appeal Court upon any such appeal shall be final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a Judge of that court."

Section 68(5) reads: "Where by this Act, or by General Rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose."

Bankruptcy Rule 72 provides that "an application for special leave to appeal from the decision of the Appeal Court and to fix the security for costs, if any, shall be made to a Judge of the Supreme Court of Canada within 30 days after the pronouncing of the decision complained of and notice of such application shall be served on the other party at least 14 days before the hearing thereof."

By sec. 2(1) of the Bankruptcy Act, "court" or "the court" means the court invested with original jurisdiction in bankruptcy under the Act, and by sec. 64(3) I am the Judge authorised to exercise the jurisdiction of the Bankruptcy Court in this Province.

The original motion was heard before me (see 57 O.L.R. 505), and my judgment was reversed by the Appellate Division (Appeal Court): see *ante* 130; and it is from the latter judgment that an appeal is now desired to be brought. It is admitted that the notice of the appeal from the judgment of the Appellate Division was filed and served within the 30 days, and the only objection was, as stated, that the motion for leave was one day late.

Counsel for the applicant stated that he was confused as to whether or not time would run during Christmas vacation in the prosecution of appeals to the Supreme Court of Canada, but in any event it was an error on his part.

The amount involved is large and the questions for final determination are of great importance to the whole commercial community, and therefore it is a case in which the law should be finally settled by the Supreme Court of Canada.

Counsel opposing argued that I had no jurisdiction and quoted many cases in support, two of the most recent being *McBride v. Ontario Jockey Club* (1925), *ante* 267, and *In re Gilbert* (1925), 5 C.B.R. 790.

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I think there can be no doubt but that this is the court having original jurisdiction; and, if I have jurisdiction, it is to be found in sec. 68(5), *supra*.

The *McBride* case was a motion for the allowance of a bond for security upon an appeal to the Privy Council, and the point there was whether or not the case was one where the right to appeal existed. It was clearly not a case where there was a right to appeal without leave under the Privy Council Appeals Act, R.S.O. 1914, ch. 54. Middleton, J. A., quite properly, I think, refused to make an order, but that case has no application, because all that the applicant is asking on this motion is for an extension of time to apply for leave to appeal.

*In re Gilbert, supra*, was an application for leave to appeal from a judgment of the Quebec Court of Appeal and for an extension of time for making the application under Bankruptcy Rule 72. That application was based on Rule 108 of the Supreme Court of Canada, and not under sec. 68(5), *supra*, and the learned Judge refused the application, for the reason that in his opinion Rule 108 of the Supreme Court of Canada did not apply, because the appeal was not at that time in that Court. It does not appear that sec. 68(5) was considered by the learned Judge; and, so far as I can see, that decision is no authority for saying that there is no jurisdiction in this Court under sec. 68(5) to extend the time for applying under Rule 72. In that case the time for applying for leave had not been extended by the Judge in Bankruptcy, and the Judge of the Supreme Court of Canada was not the tribunal for granting such extension.

In my opinion, this Court has a discretionary power to extend the time for applying for leave to appeal under Rule 72; and, having regard to the provisions of sec. 84, from which it appears that proceedings in bankruptcy are not to be defeated by mere irregularities or technicalities, I think this is a proper case for granting the extension asked.

Holding this view, it is unnecessary for me to refer to the numerous cases cited by the learned counsel for the respondents. Here there was a *bonâ fide* intention to appeal, manifested by the service of the notice of motion within the 30 days. The question involved is, as I have stated, an important one; and I will, therefore, in the exercise of my discretion, extend the time for 20 days to enable the applicant to apply for leave, and in the meantime execution will be stayed, leaving the whole matter to the Supreme Court of Canada for determination as to whether or not the appli-

cation is *res judicata*, and to grant or refuse the special leave asked, but the order will be subject to the payment of the costs of the former application. The respondents are also entitled to the costs of this application, which I fix at \$25.

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*Will—Legacy—Time for Payment—Discretion of Person Named—  
Delay in Payment — Whether for Convenience of Estate — Adult  
Legatee—Interest, when Commencing.*

A legacy payable from a fund of personalty or a mixed fund of realty and personalty will *primâ facie* carry interest from one year after the death of the testator. If a date for payment be fixed in the will, interest will run from that date. In the case of an infant legatee, the testator being *in loco parentis*, and there being no other provision for maintenance, interest runs from the death, whether the legacy be absolute or conditional. But where, as here, the legatee is an adult, and the date of payment is in the discretion of some person or persons named in the will, not being executor or executors, and there is nothing to shew that the delay in payment was or was not for the convenience of the estate, there is nothing to take the legacy out of the usual rule, and interest runs from one year after the death.

Review of the authorities.

MOTION by Irene Gibbons, a legatee under the will of F. J. Daly, deceased, for an order declaring her entitled to interest upon the amount of her legacy.

January 18. The motion was heard by RIDDELL, J.A., in the Weekly Court, Toronto.

*J. Parker*, for the applicant.

*P. E. F. Smily*, for the executors.

*Lyle Ramsey*, for the Official Guardian.

January 19. RIDDELL, J.A.:—The late F. J. Daly, in his last will and testament, dated the 25th February, 1913, and codicils, appointed his adopted sons H. J. and George Daly with Daniel O'Connell executors—they took probate on the 31st December, 1915, the testator having died on the 20th October, 1915.

After certain specific bequests, all the remainder of the property, real and personal, was left to the executors in trust "to pay within two years after my death the following legacies (with the exception of the legacy to my adopted daughter Irene Daly which shall be paid to her at such times and in such amounts as

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my wife and the said Daniel O'Connell shall think fit or in the event of their death as the said Reverend Father McColl and the said John Richard Corkery shall think fit but should my wife marry again she shall not be consulted as to the said payments) to my adopted daughter Irene Daly the sum of \$5,000. . . ."—then follow certain other bequests—and directions not material to the present judgment.

The Reverend Father McColl was named an executor in the will, but this has been revoked in a codicil; the said John Richard Corkery was named in the will as an executor in case Daniel O'Connell did not act.

Irene Daly (now Irene Gibbons) received \$1,500, part of her legacy of \$5,000, and certain payments were made to other legatees; on an application to the Court, on the 25th February, 1925, an order was made for the payment, out of the moneys in Court, of the balance of the legacies, including \$3,500 to Irene Gibbons. In taking out the formal order it was provided that interest should be paid upon the other legacies from the 20th October, 1917 (two years after the death of the testator), but no provision was made for payment of interest to Irene Gibbons.

The present motion is for an order that she should be paid interest.

Whether the reason of the rule is correctly stated or not by Grant, M.R., in *Wood v. Penoyre* (1807), 13 Ves. 325, a long line of decisions has settled beyond questioning that a legacy payable from a fund of personalty or a mixed fund of realty and personalty will *primâ facie* carry interest from one year after the death.

If a date of payment be fixed in the will, interest will run from that date.

But, if the testator be *in loco parentis* to the legatee, the legatee being an infant, and there being no other provision for maintenance, interest runs from the death: *Wilson v. Maddison* (1843), 2 Y. & C.Ch. 372; *Raven v. Waite* (1818), 1 Swanst. 553; *In re Bowlby*, [1904] 2 Ch. 685; Theobald on Wills, 7th ed., p. 191; Jarman on Wills, 6th ed., vol. 2, pp. 1108, 1114, and cases mentioned—and this whether the legacy be absolute or conditional.

Here, however, the legatee (Irene) was not an infant, and other considerations apply. We must examine into the law where the date of payment is in the discretion of some person or persons named.

Where the person upon whose discretion the date depends is the executor, the delay, if any, is considered to be for the convenience of the estate, and interest is payable from a year after

death: *Varley v. Winn* (1856), 2 K. & J. 700—unless, indeed, the executor is residuary legatee, in which case no interest is payable. The only way to reconcile *Varley v. Winn* with *Thomas v. Attorney-General* (1837), 2 Y. & C. Ex. 525, is to consider (with Theobald, p. 190) that in the latter case the discretion is the discretion of the residuary legatee, although the husband in that case was the executor, and in the absence of authority I should have thought that it was his convenience *quâ* executor that was considered.

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Here, however, the decision was not in the hands of the executors—the two executors first named, the two adopted sons, had no say at all—the widow, who had nothing to do with the management of the estate, associated with Mr. O'Connell, had the decision at least so long as she remained unmarried; in case of the death of both, the Reverend Father and Mr. Corkery had the power. Clearly this power was not given to the Reverend Father *quâ* executor—because, when he was relieved by the third codicil from being executor, the personal and more delicate duty remained unaffected.

I can find no reason for saying that any postponement allowed was or was not so allowed for the convenience of the estate; and the executors are not residuary legatees.

Nor is there any reason why the interest should begin only on the expiration of two years from death—this legacy is explicitly excepted from the two-year limit. There is nothing to take the bequest out of the usual rule.

Interest will be paid from the 20th October, 1916. There will be no costs—the matter should have been disposed of at one hearing.

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[APPELLATE DIVISION.]

YOUNG v. CROTEAU.

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Jan. 21.

*Contract—Money Lent—Pledge of Shares as Security—Default—Sale of Shares—Bona Fides—Notice—Opportunity to Redeem—Surplus Shares.*

The judgment of LOGIE, J., *ante* 76, affirmed.

AN appeal by the plaintiff from the judgment of LOGIE, J., *ante* 76, upon the ground that, in addition to the relief awarded to the plaintiff by the judgment, the defendant should have been ordered to deliver up to the plaintiff 33,500 shares of the capital



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stock of Holtvrex Gold Mines Ltd., upon payment of \$1,500 and interest.

January 21. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

*J. J. Gray*, for the appellant, argued that the defendant did not make a valid sale of the 33,500 shares, being part of the 50,000 shares which were deposited with him by the appellant as security for repayment of the loan of \$1,500, as the transaction was between the defendant and his agent for sale. This sale could not stand, because the defendant vendor, who was merely a mortgagee, had not striven to obtain the best price possible. He had sold at 4.7 cents a share, whereas he should have received 10 cents to 35 cents a share; he should have accounted to the appellant for the market value of these shares at the time of sale, less the principal of the loan and interest. The deposit of the shares was a mortgage: *Salt v. Marquess of Northampton*, [1892] A.C. 1; *Farrar v. Farrars Ltd.* (1888), 40 Ch.D. 395. After the day fixed for payment of the loan, the defendant had extended the time for payment indefinitely, and had not, as he was bound to do, given the appellant notice of his intention to sell: *Deverges v. Sandeman Clark & Co.*, [1902] 1 Ch. 579; *Aldrich v. Canada Permanent Loan and Savings Co.* (1897), 24 A.R. 193.

*E. G. Black*, for the defendant, respondent, contended that no extension of credit had ever been given; that the sale was a *bonâ fide* one; and that as good a price had been obtained for the shares as was possible.

The judgment of the Court was delivered at the conclusion of the argument by LATCHFORD, C.J.:—We think the result arrived at by the learned trial Judge was right. The shares were pledged as security for the loan, and there was default. The plaintiff was given an opportunity to redeem; and, after the lapse of what we consider a reasonable time, the shares, which had merely a speculative value, were sold by the defendant, acting in good faith, for the best price then obtainable.

The only other observation I desire to make is that I do not consider anything in the agreement to be in the nature of what is called a clog on the right of the plaintiff to redeem.

*Appeal dismissed with costs.*

[FISHER, J.]

GORDON MACKAY &amp; Co. LTD. v. J. A. LAROCQUE Co. LTD.

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Jan. 22.

*Company—Incorporation under Dominion Companies Act—Mortgage of Lands and Movable Assets—"Floating Charge"—Sec. 69A of Act (7 & 8 Geo. V. ch. 25, sec. 9)—Registration with Secretary of State for Canada — Future-acquired Property — Whether Registration under Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, and Assignment of Book Debts Act, 1923, 13 & 14 Geo. V. ch. 29, Necessary as against Creditors and Trustee in Bankruptcy of Company.*

A trading company, incorporated under the Dominion Companies Act, made a mortgage and pledge to a trustee for its bondholders of all its lands and "all its movable assets for the time being, both present and future, of whatsoever kind and wheresoever situate, in the Province of Ontario, hereinafter referred to as the 'floating charge property.'" The description of the personal property included book debts; and it was provided by the instrument that the "floating charge" should not prevent the company, until the security became enforceable, from dealing with the property in the ordinary course of business and for the purpose of carrying on the same. The instrument was registered with the Secretary of State, as required by the Dominion Act, but was not registered as a chattel mortgage under the Ontario Bills of Sale and Chattel Mortgage Act, nor as an assignment of book debts under the Assignment of Book Debts Act, 1923:—*Held*, that the company had a right to create a "floating" charge on its movable assets: sec. 69A(1) of the Dominion Act, added in 1917 by 7 & 8 Geo. V. ch. 25, sec. 9; but the instrument was also a chattel mortgage and an assignment of book debts, within the meaning of the Ontario Acts referred to, and, so far as the movable assets were concerned, was void as against the creditors, represented by the trustee in bankruptcy, of the company for want of registration. The registration with the Secretary of State did not satisfy the provisions of the Ontario Acts. *National Trust Co. v. Trusts and Guarantee Co.* (1912), 26 O.L.R. 279, applied and followed.

THIS action was commenced on the 6th August, 1925, by Gordon Mackay & Co. Ltd., suing on behalf of itself and all other creditors of the defendant the J. A. Larocque Company Ltd., alleging that a trust mortgage made by that defendant to the defendant the Capital Trust Corporation Ltd., as trustee for the holders of bonds of the Larocque company, was void as against creditors because not registered as a chattel mortgage and as an assignment of book debts, and claiming to have it so declared.

On the 21st August, 1925, the Larocque company was declared bankrupt, and the Canadian Credit Men's Association was appointed trustee of the estate and (by order) added as a plaintiff in this action, which (by leave of the Court) was continued notwithstanding the bankruptcy.

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The action was tried by FISHER, J., without a jury, in Toronto. *G. H. Kilmer*, K.C. and *T. A. Beament*, K.C., for the plaintiffs.

*F. H. Chrysler*, K.C., and *D. L. McCarthy*, K.C., for the defendants.

January 22. FISHER, J.:—The J. A. Larocque Company Ltd. was incorporated under the Dominion Companies Act, and carried on the business of retail merchants in the city of Ottawa. The company decided to borrow money for its corporate purposes by the issue of bonds, and, to secure payment thereof, both as to principal and interest, agreed to and did give a deed and trust mortgage to the defendant the Capital Trust Corporation Ltd., as trustee for the bondholders, on its lands and all its movable assets, including book debts. The amount of the issue was \$250,000, bearing interest at 7 per cent., and payable in 20 years. The trust mortgage was put in as exhibit 2, and attached to the instrument is a form of bond. Part thereof reads:—

“The principal and interest of this bond and all other bonds which may be issued as aforesaid shall rank *pari passu* and are secured as provided for by a trust deed executed by the company in favour of the Capital Trust Corporation Limited, as trustee, at Ottawa, on the 17th day of September, 1923, to which trust deed reference is hereby made for a description of the securities and properties pledged, hypothecated or mortgaged, the nature and extent thereof, the rights of the holders of the said bonds in respect of such securities, pledge, hypothec and mortgage, and the terms upon which the said bonds are issued and secured.”

The deed or trust mortgage in part recites:—

“In consideration of \$1 to it paid by the trustee, receipt whereof is hereby acknowledged, has sold, assigned, transferred, hypothecated, mortgaged, pledged, and set over, and by these presents doth sell assign, transfer, hypothecate, mortgage, pledge, set over, and charge unto the trustee, its successors and assigns forever.”

Paragraph 2 read:—

“All its movable assets for the time being, both present and future, of whatsoever kind and wheresoever situate, in the Province of Ontario, hereinafter referred to as the ‘floating charge property.’”

Then follows a description of all the personal property, moneys, securities for money, including book debts, and “all of the property and things of value of every kind and nature which the company may be or hereafter shall become possessed of or entitled to, pro-



vided that the 'floating charge' created by this paragraph shall in no way hinder or prevent the company, until the security hereby constituted shall become enforceable and the trustee shall have demanded or become bound to enforce the same either by dividends out of the profits, leasing, mortgaging, pledging, selling, alienating or otherwise disposing of or dealing with the subject-matters of such 'floating charge' in the ordinary course of its business and for the purpose of carrying on the same."

Then follows the defeasance and the other usual clauses to be found in all such bond mortgages.

Default was made by the company under the mortgage, and on the 9th June, 1925, the defendant the Capital Trust Corporation took possession as trustee of all the Larocque company's property according to the terms therein set out. Subsequently a receiver was appointed, and he has ever since carried on and is still carrying on the business of the company.

On the 21st August, 1925, the Larocque company was by an order of the Court declared bankrupt, and the plaintiff the Canadian Credit Men's Association was subsequently appointed trustee by the creditors of the insolvent company.

On the 6th August, 1925, this action was commenced by the plaintiff Gordon McKay & Co. Ltd., suing on behalf of itself and all other creditors of the insolvent company, to set aside the deed and trust mortgage for want of registration both as a chattel mortgage and as an assignment of the book debts.

On the 25th August, 1925, the plaintiff the Canadian Credit Men's Association, as trustee, demanded possession of the Larocque company's assets from the trustee for the bondholders, and was refused, and on the 17th November, 1925, the trustee under the receiving order was, by an order of the Court, added as a party plaintiff, and by the same order leave was granted to the plaintiffs to proceed with this action.

There are practically no facts in dispute, and written admissions were filed and put in as exhibit 1. These admissions shew that bonds were issued of the face value of \$120,000, and that these were delivered to and held by La Banque Provinciale du Canada, a creditor of the insolvent company, as collateral security for an indebtedness of \$70,000, and that the trust mortgage was registered against the lands on the 20th September, 1923, and with the Secretary of State on the 23rd September, 1923.

There is no suggestion of a fraudulent preference under any Act, and so far as the mortgage refers to the lands it is not attacked.

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Counsel for the plaintiffs contend that the assignment in question, of the goods and chattels and all the movable assets present and future, is a mortgage within the meaning of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, and for want of registration is void as regards these assets against the creditors of the mortgagor; and, as the book debts were included in the description of the movable assets, the instrument is an assignment of or a charge thereon, and, not being registered as provided by the Assignment of Book Debts Act, 1923, 13 & 14 Geo. V. ch. 29 (Ont.), is void as against creditors.

It is to be noted here that this Act was in force at the date of the mortgage.

Counsel for the defendants contend that the Bills of Sale and Chattel Mortgage Act and the Assignment of Book Debts Act have no application, as the mortgage was not a chattel mortgage within the meaning of that Act, but a "floating charge" on all the movable assets, including the book debts.

The Dominion Companies Amendment Act, 1917, 7 & 8 Geo. V. ch. 25, sec. 9, adds to the principal Act a new section, 69A, which provides (1) that a company may mortgage or charge its assets for the purpose of securing an issue of debentures, and (c) create a "floating charge" on the undertaking or property of the company, so that I think there can be no question but that the insolvent company had a right to create what has been described as a "floating charge" on its movable assets.

If a chattel mortgage is taken on property to secure a loan, there is no right in the mortgagor, unless the mortgage so provides, to lease, mortgage, pledge, or dispose of the property until payment is made or there is default.

In the present case it is not denied that the mortgagors had the right to deal with the movable assets as if no mortgage had been given, but subject to the right of the mortgagee, upon default, to take possession, etc.

Mr. McCarthy strongly urges that, as there was a floating charge, registered with the Secretary of State in accordance with the Act, there was no obligation to register it as a chattel mortgage, but admits that so far as the instrument relates to the lands the provincial law must govern.

The real question to be decided in this case turns upon the construction of the trust mortgage. Is not a fair and reasonable construction of the instrument this: a mortgage on the lands and movable assets, present and future, with a right in the mortgagors to deal with these movable assets in carrying on the ordinary busi-

ness of the company until payment in full or default, and upon default a right in the mortgagees to take possession under and subject to the terms of the mortgage? If this is the true meaning, can it be said that the instrument is a mere charge?

Mr. McCarthy admitted in his argument that upon default, without more, the instrument immediately crystallised itself into and became an effective mortgage, but a question to be asked here is, can the trust mortgage in question operate as an effective "floating charge" only up to the 8th June, 1925 (the day before possession was taken), and on the 9th June, 1925, because of default and possession taken, crystallise into and become an effective mortgage?

Palmer, in his *Company Law*, 11th ed., p. 319, says (and refers to several cases in support): "A floating charge operates as an *immediate and continuing charge* on the property charged subject only to the company's powers to deal with the property in the ordinary course of business;" and, "A floating charge, unless otherwise agreed, leaves the company at liberty to create specific mortgages ranking in priority to the floating charge;" and again refers to several cases in support.

As far back as 1887, a floating charge seems to have been recognised in the case of *Coyne v. Lee*, 14 A.R. 503. That was an action under a chattel mortgage covering the stock in trade "and all goods which at any time may be owned by the mortgagor and kept in the said store for sale and whether now in stock or hereafter to be purchased and placed in stock." The Court of Appeal upheld the mortgage as a security on the stock in trade and on the future-acquired stock, Hagarty, C.J.O., at pp. 510, 511, said: "If a valid charge cannot be created on the latter, of course any security on a retail dealer's stock will be almost valueless. The more active might be his sales, the more worthless the security. The class of case before us is a mortgage security on a stock of goods in a particular business, and whatever new goods come in to supply those sold, and to keep up the stock, become, in effect, the substantial property mortgaged, viz., a stock of goods." In that case there was an express right in the mortgagor to go on and deal with his goods in the ordinary course of business until default.

It was not until 1892 that an amendment appeared in our statutes, 55 Vict. ch. 26, sec. 1, amending the Act respecting Sales and Mortgages of Personal Property. Under that amendment the right to mortgage future-acquired property was given, and sec. 11 of the present Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, is taken from the revision in 1894 (57 Vict. ch. 37, sec. 37) of the amended Act.

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There can be no doubt that mortgages by companies to secure bonds and debentures are clearly within the contemplation of R.S.O. 1914, ch. 135. Provision is made by sec. 24(1) as to the person to take the required affidavit for the purpose of registration, and by sec. 24(4) provision is made respecting the renewals of such mortgages.

In *Johnston v. Wade* (1908), 17 O.L.R. 372, the Court of Appeal decided that an instrument which created a mere charge on the personal property of the company was not a mortgage or bill of sale within the meaning of the Act, because it did not convey or assign the goods and chattels charged; in the present case the instrument in question is a conveyance or assignment to the mortgagees of the goods in question, but it is argued that the conveyance is not, according to its terms, intended to have any greater effect than a charge, that it is only to come into effective operation when default is made. It cannot, however, be denied that when it does come into operation it is to all intents and purposes a mortgage and an effective assignment of the property, and does not merely create a lien or charge upon it. The fact is sufficient to distinguish this case from *Johnston v. Wade*; but, if the effect of the instrument be, as suggested, to create a mortgage to take effect at some future time, then it would in substance be an agreement to give a mortgage, and as such would come within sec. 16 of the Bills of Sale and Chattel Mortgage Act. Section 16 reads, "Every covenant, promise or agreement to make, execute or give a mortgage on goods or chattels shall be in writing, and shall be deemed to be a mortgage within the meaning of this Act," and would be void for want of registration, so that, if it is a present mortgage on chattels, it must be registered, and if it is in effect an agreement to give a mortgage on chattels, it must also be registered. *A fortiori* is registration of the assignment of book debts necessary, because under the Assignment of Book Debts Act, 1923, sec. 2, "‘assignment’ shall include save as herein provided every assignment by way of security and every mortgage or other charge upon book debts or accounts."

The learned counsel for the defendants described the security as ambulatory. It appears to be rather a security in a state of "suspended animation."

Every mortgage under the Bills of Sale and Chattel Mortgage Act takes effect from execution (sec. 9), and must be registered within 5 days from execution (sec. 18 (3)), and must also be renewed.

As stated, the Dominion Act specifically authorises the creating



of a floating charge and registration with the Secretary of State within 30 days after its execution. See sec. 69A(1) (c), *supra*. If a floating charge only had been created without a transfer of the property, the Dominion Act being complied with, *Johnston v. Wade* would govern, but is not the instrument in the present case conclusive evidence that the company did more? It gave a conveyance and mortgage to secure these bonds on both its lands and goods, present and future; and, whilst the bonds, attached to and forming part of the mortgage, are not a present charge on the property (movable assets present and future), nevertheless they are secured "as provided for in the mortgage;" and therefore it seems to me that the floating charge, as described in the present case, was never intended to be independent of the mortgage, but on the contrary it operated as an immediate and continuing charge, subject only to the company's right to deal with the property in the ordinary course of business until default.

If sec. 11 of the Bills of Sale and Chattel Mortgage Act permits the giving, as I think it does, of a mortgage on present and future-acquired property, with the right in the mortgagor to carry on his business in the ordinary course until default, and that mortgage is required to be registered within 5 days, I fail to see in what respect there can be any difference between a mortgage under this section and a floating charge created by mortgage under sec. 69A(1) (c).

If I am right, then did the registration of the trust mortgage with the Secretary of State satisfy the provisions of the Bills of Sale and Chattel Mortgage Act? I think not. As that Act is admittedly *intra vires* the Province, passed for the protection of creditors, and as its provisions in no way interfere with the objects of or the carrying on of the company's business in this Province, registration with the Secretary of State only did not do away with the necessity for complying with the provisions of the Provincial Act requiring registration, as creditors intending to do business with a company in this Province are entitled to rely, so far as chattel property and assignments or charges on book debts are concerned, on what is to be found in the office of the Clerk of the County Court of the county in which the head-office of the company is situate.

It was decided in *National Trust Co. v. Trusts and Guarantee Co.* (1912), 26 O.L.R. 279, that a mortgage on specific chattel property given as security for the payment of bonds or debentures is within the Bills of Sale and Chattel Mortgage Act and must be registered. The mortgage in that case contained the usual pro-

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visions for redemption and covered the entire undertaking of the company, present and future, and provided that the mortgagees until default had the right to carry on as if the mortgage on the chattels had not existed. It was found by the learned Judge who decided that case that the instrument there in question, though a floating charge, was nevertheless a chattel mortgage, and I confess, although the wording in the instrument in the present case differs from the wording of that in the *National Trust* case, I am unable to distinguish that case from the one before me.

As the trust mortgage in the present case was given as security for the payment of the bonds, although the language used, in so far as it relates to the movable assets, present and future, describes these assets as being in the nature of a floating charge, a fair and reasonable construction of the document leads me to the opinion that it operated as a mortgage and continued as such, subject only to the company's powers to deal with the property covered thereby in the ordinary course of business, and therefore it is an instrument within the meaning of the Bills of Sale and Chattel Mortgage Act.

There will be judgment in favour of the plaintiffs, declaring that, so far as the mortgage purports to cover the movable assets and book debts, it was and is null and void as against the trustee, for want of registration, with costs, and for payment by the defendant the Capital Trust Corporation to the plaintiff the Canadian Credit Men's Association of all moneys realised from the sale of the movable assets and book debts since the 9th day of June, 1925, being the date when possession was taken, and also for possession of all unsold movable assets and book debts, less the cost of carrying on the business.

If the parties cannot agree on the amount realised on the assets since possession was taken, and on the assets to be delivered and the accounting in connection with the carrying on of the business by the mortgagees, there will be a reference to the Master at Ottawa, with costs reserved until after his report.

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[APPELLATE DIVISION.]

REX v. SLEE.

1926.

Jan. 25.

*Criminal Law—Evidence of Accomplice—Lack of Corroboration—  
Judge's Charge—Misdirection.*

The effect of the Judge's charge to the jury, upon the trial of a prisoner charged with arson, was that, while it is dangerous to convict on the evidence of an accomplice without corroboration, yet in this case it was the right and duty of the jury, if on the accomplice's evidence they felt no reasonable doubt of the guilt of the accused, to convict him:—

*Held*, that this was misdirection.

*Rex v. Beebe* (1925), 19 Cr. App. R. 22, followed.

*Held*, also, that if the Judge discusses the evidence of an accomplice and points out its consistency, he should explain to the jury the considerations which prompt an accomplice to testify against the accused.

Conviction set aside and new trial ordered.

THE defendant was indicted for arson, and upon trial at the Whitby Assizes before RIDDELL, J., and a jury, was convicted and sentenced to imprisonment for 12 years in the Kingston Penitentiary.

The defendant appealed from his conviction and sentence upon the following grounds: (1) that he was not guilty of the offence stated in the conviction; (2) that the trial Judge misdirected the jury upon questions of law involved; (3) that the accused should have been acquitted because there was no corroborative evidence; (4) that the verdict was against law and evidence; (5) that the sentence imposed was, in the circumstances, too severe; and (6) on such other grounds as may be deemed expedient or the Court may allow at the hearing of the appeal.

The chief witnesses for the Crown were William Hillis and Charles Lacy, both of whom, according to their evidence, were accomplices of the defendant.

January 13. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

*C. A. Thompson*, for the appellant, contended that in his charge the trial Judge erred in failing to direct the jury not to convict on the uncorroborated testimony of an accomplice. The evidence of one accomplice is not corroboration of the evidence of his co-accomplice. In any event, the sentence was excessive and should be reduced. Reference to *Regina v. Stubbs* (1855), 25 L.J.M.C. 16; *Rex v. Jones* (1809), 2 Camp. 131; *In re Meunier*, [1894] 2 Q.B. 415; *Rex v. Bechtel* (1913), 21 Can. Crim. Cas. 40; *Regina v.*

App. Div. *Birkett* (1839), 8 C. & P. 732; *Rex v. Shemit* (1925), 44 Can. Crim. Cas. 10; *Rex v. Mason* (1910), 5 Cr. App. R. 171.

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*Edward Bayly*, K.C., for the Crown, contended that the jury had not been misdirected. The only duty of the trial Judge was to advise the jury that it is unsafe to convict on the uncorroborated evidence of an accomplice. This the trial Judge did. The question of a reduction of the sentence is one for executive clemency, rather than for this Court. Reference to sec. 1014 of the Criminal Code as enacted by (1923) 13 & 14 Geo. V. ch. 41, sec. 9; *Rex v. Baskerville* (1916), 12 Cr. App. R. 81, [1916] 2 K.B. 658; *Rex v. Coppen* (1920), 47 O.L.R. 399, at p. 406.

January 25. The judgment of the majority of the Court was (by direction of the Chief Justice) read by HODGINS, J.A.:—The exact point argued in this case has recently been decided by the Court of Criminal Appeal in England (Lord Hewart, L.C.J., Avory and Sherman, JJ.) in *Rex v. Beebe* (1925), 19 Cr. App. R. 22.

If we conclude to follow this case, in the interest of uniformity in criminal practice, as I think we should, there can be no doubt that the learned trial Judge went beyond what is laid down as a proper direction to the jury in regard to the evidence of an accomplice.

In the *Beebe* case the trial Judge, Roche, J., had told the jury: "I tell you that it is generally dangerous to convict on the evidence of an accomplice, but I am not going to tell you, as I could not, that you ought not . . . ; I am going to leave that to you." And a little later: "If you are quite certain that that girl is telling the truth and nothing but the truth so that you are satisfied in your heart and conscience, although it is uncorroborated, you ought to act upon it. If you are not satisfied up to the very hilt then do not do it."

Lord Hewart, in his comment in regard to the charge, mentions two points where there was, in the judgment of the Court, misdirection. First the warning that "it is generally dangerous to convict on the evidence of an accomplice," as to which he says: "That warning may well convey to the minds of the jury that, although as a rule it is dangerous to convict on the evidence of an accomplice, that rule is by no means of universal application, and that there may be cases in which it is quite safe to convict upon the evidence of an accomplice without corroboration, and, by implication, that this case is one of such cases."

The second point is that the learned trial Judge in what I have quoted said: "If you are quite certain that that girl is tell-

ing the truth . . . although it is uncorroborated, you ought to act upon it."

On this the Court remarks: "Those words are not only not a warning of the danger of so acting, and not only are they not a refraining from advising the jury so to act, but they are quite clearly an affirmative and express direction to the jury that in that event they ought so to act. In the opinion of this Court that direction is not such a direction as should, according to the law laid down in *Baskerville's* case, be given. It may very well have led the jury to think that upon the particular facts of this case the general warning had no real application, or might be disregarded."

The reason of the rule laid down in *Rex v. Baskerville*, [1916] 2 K.B. 658, which the Court adopts, is entirely a practical one. The argument is that the Judge should not say, "If you believe the evidence you ought to act on it," because by so saying he weakens or destroys the force of the warning against doing that very thing.

Turning to the case at bar, it is quite clear that the trial Judge gave the necessary warnings more than once, and I do not repeat them here. The evidence of the accomplices was uncorroborated, as it is admitted.

The observations of the learned trial Judge which seem to bring the case directly within the *Beebe* case are these:—

"So I follow out the dictates of the Law by telling you it is unsafe to convict, advising you against convicting if there is no corroboration of these accomplices; but, notwithstanding that, the Law says that you are the final judges of the facts, corroboration or not, and that is: if you, having seen the witnesses, and having heard all the evidence, even without corroboration, say that this man beyond reasonable doubt is guilty of the offence charged against him, you are entitled to convict him."

Then, after pointing out why one of the accomplices had no interest in telling the story which he has detailed, which brought him no advantage, the learned Judge discusses that evidence and then proceeds:—

"No matter what consideration may enter into the matter in the long run it all comes down to that. Whom do you believe? . . . Now, remember, you are to take the whole of the story. You are to bring to your recollection the witnesses, how they conducted themselves in the witness-box, make up your own minds as to what the facts were, and then, having made up your own minds as to what the facts were, the Law says it is your duty to find a verdict according to what you conceive to be the facts as

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established by the evidence. . . . If, upon all this evidence, you are satisfied that that is the true story, it is your duty to convict."

Then, after reminding them of his warning as to convicting without corroboration, he concludes in these words:—

"If, when you have fully considered the whole matter, you facing your own souls, cannot say that there is a reasonable doubt of this man's guilt, it is your duty to convict."

From these extracts no doubt can exist that the effect of the charge is this: that, while it is dangerous to convict on the evidence of an accomplice without corroboration, yet in this case it is the duty of the jury, if on the accomplice's evidence they feel no reasonable doubt of the guilt of the accused, to convict him.

I cannot distinguish this case from the *Beebe* case: while it is dangerous to convict, yet they may do so in this case, and if they believe the accomplice it is indeed their duty to convict. There is not only the implication that this is a case where it is safe to convict on the evidence of the accomplice, but the statement that, if satisfied that it is true, they ought to do so.

Another point should be noticed. In the learned Judge's charge he outlined the story of the accomplice and said, "What interest has he in telling what is not true?" "What advantage is it to him to lie about it: what good is it going to do him?" This practical commendation of his story leaves out considerations which often prompt accomplices—the favour of the Crown or the shielding of his companions. If the evidence of an accomplice is to be discussed at all by the Judge it would seem to be his duty, if he points out its consistency, to explain that the danger of which he has warned them is that reasons such as I have mentioned may lie at the bottom of its apparent plausibility.

I think there should be a new trial.

*Order accordingly.*

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## [APPELLATE DIVISION.]

TRUMAN V. FORD MOTOR CO. OF CANADA LTD.

1926.

Jan. 25.

*Contract—Furnishing Materials and Work—Performance to be to Satisfaction of the other Party—Rejection—Honesty—Reasonableness—Finding of Jury.*

The plaintiff agreed in writing to furnish and place sods around the defendant company's power-house according to specifications and to the defendant company's satisfaction, and the defendant company agreed to pay the plaintiff at a rate per square yard for the work and material. After the plaintiff had cut and prepared the sods and begun to lay them, the defendant company, not being satisfied with the sods or the work, cancelled the contract. The plaintiff brought this action for damages for breach of the contract, and the jury found that the defendant company acted honestly but unreasonably:—*Held*, that the jury had no power to substitute their judgment for that of the defendant company—the judge named in the contract to whose satisfaction the work was to be done; the judgment of the company, honestly arrived at, was final; and the plaintiff was not entitled to recover for breach of the contract.

The statement of the law as to contracts in which one party agrees to perform to the satisfaction of the other, in 13 *Corpus Juris*, pp. 675 to 678, adopted.

APPEAL by the defendant company from a judgment of the County Court of the County of Essex, pronounced on the findings of a jury, in favour of the plaintiff in an action for damages for breach of contract, brought and tried in that Court.

November 13, 1925. The appeal was heard by MULOCK, C.J.O., MAGEE, FERGUSON, and SMITH, JJ.A.

*H. L. Barnes*, for the appellant company.

*J. H. Clark*, for the plaintiff, respondent.

January 25, 1926. FERGUSON, J.A.:—Appeal by the defendant from a judgment of his Honour Judge Coughlin of the County Court of the County of Essex, pronounced on the findings of a jury.

The plaintiff and defendant entered into a contract in writing whereby the plaintiff agreed to furnish and place around the defendant's power-house at Ford, Ontario, according to the specifications and to the defendant's satisfaction, at the rate of 47 cents per square yard, sods to be at least 18" x 36."

The contract, under the heading "Conditions," contains among other provisions the following:—

"*Inspection*: Materials purchased are subject to first party's inspection and approval and if rejected will be held at first party's risk, and returnable at second party's expense.

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*"Cancellation:* The first party (Ford) further reserves the right to cancel this order if material is not in accordance with . . . approved samples or specifications or is defective in workmanship or material or is not satisfactory to first party."

The specifications read:—

"All sods are to be of a quality satisfactory to the Ford Motor Company of Canada Limited equal to the sample furnished for exhibit.

"The contractor shall roll down and grade uniformly any minor irregularities in the subsoil and roll the whole area before laying sod.

"Sods are to be neatly cut to conform to all buildings, man-holes, clean-outs, and other works in area. The slopes along tracks down to track level are to be sodded.

"The area intended to be covered with sod is within the following boundaries: line with south side of power-house produced easterly to east property line and west to a line 50 feet from power-house and parallel to it; by this last-mentioned line on west side; by Sandwich street sidewalk on north side; and by east property line on east, excepting areas covered by power-house building, roadway, and railway siding.

"The company reserves the right to change this area as it may see fit.

"The contractor shall guarantee the sod in first-class condition and do any necessary replacements for one month after completion and to keep sod watered and cared for until same is growing. He agrees to a hold-back of 20 per cent. of the contract price for one month after final completion, as a guarantee.

"Any water required will be furnished by the company.

"The contractor is to supply all materials and equipment required to complete the work and to roll and tamp sod after placing to a uniform surface.

"All work is to be done in a manner satisfactory to the Ford Motor Company of Canada Limited and as designated by their representative. A first-class job is required.

"The price for completed work is 47 cents per square yard of area covered.

"Eighty per cent. payable on final completion of the work and 20 per cent. one month after."

With his tender the plaintiff submitted a sample of the sod—but the contract was not let till a fortnight later. When the plaintiff started to lay sods, the defendant was not satisfied with the sods or the work, and cancelled the contract, and this action is for

damages. It is found and not questioned that the defendant acted honestly, but it has been found that it acted unreasonably. The cause of the dispute cannot, I think, be better stated than by quoting a few questions and answers from the plaintiff's testimony:—

"Mr. Barnes (counsel for the defendant): No. The contract is in writing.

"Q. Well, going on from there, after you saw Mr. Porter what took place? A. About the getting of the sod?

"Q. About carrying out this contract. A. We went out and prepared the sod for cutting, cut it all off and raked it and cut it again, and put lawn-mowers on it and cut it again.

"Q. Where was this sod, in a field? A. Yes, in a field.

"Q. What did you do to it? A. Cut the long grass with a side-cut—with a farm-mower—and then afterwards we raked it and cut it over again, and put a lot of team labour on it that way, and then we cut it with a lawn-mower.

"Q. Where did you get the sample of the sod? A. Off the same piece as we got the other, exactly.

"Q. Would a difference of three weeks make a difference in the appearance of the sod? A. Oh, a world of difference.

"Q. Why? A. In three weeks, if the grass was short, in three weeks' time you would have to put a big mower on to cut the grass down.

"Q. How would that change the appearance of the sod? A. It would make it look a little rough and dead-looking.

"Q. Explain that. Why? A. Naturally enough, when you cut long grass off sod that way it cuts it down to kind of a dry point where it shews dark, and it does not shew the same appearance as though it was short grass."

The relevant part of the charge of the learned Judge to the jury reads:—

"This contract contains a paragraph, read to you, giving the company the power to reject the sods if not satisfactory to the Ford Motor Company. That, read in its widest sense, would give a very great power to the company in the way of rejection, and be a dangerous thing from the plaintiff's standpoint to embody in a contract. The Court has modified the strict meaning of that term by holding that such a term of rejection is to be qualified by implying that it shall be honest in the first place and reasonable in the second place. A rejection may be mistaken and still be good. If a man acts honestly and reasonably but notwithstanding makes a mistake he is protected even though he may be mistaken. To afford such protection is one of the objects in view in the insertion of such

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clauses. The mere fact that the defendant, or Mr. Porter, may have been in error in coming to a certain conclusion does not prove that it or he acted either dishonestly or unreasonably; that is, it does not necessarily prove it. It may be of some value in enabling you to come to the conclusion that the action was unreasonable, but it is not necessarily conclusive proof. So, in regard to Mr. Porter's action, I may reiterate that he had the right to reject the sod or the method of sodding, provided in the first place that he acted honestly and in the second place that he acted reasonably in making the rejection he made at the time he made it.

"Now I do not think I have anything further to add to that. You will come to your conclusion, first, whether he was honest, and, second, whether he was reasonable. The plaintiff does not question the honesty, but he does say Porter acted unreasonably in rejecting the sods at that stage of the completion of the contract. According to the plaintiff, that sod was a good sod for the purpose for which it was intended and was just as good as the sample, provided it got a little time to take on its green. He says, furthermore, that the laying of the sod was all right, even though there were some openings, because the openings could be patched and the patches would have knit together and you would have had a perfect job, in time. He says that Mr. Porter, in rejecting the job, was acting unreasonably. It is for you to say whether or not he was then acting reasonably or unreasonably."

The defendant's objection to the charge reads:—

"Mr. Barnes: You have instructed the jury that with reference to the contract the sods were to be satisfactory to the Ford Motor Company, that the law implies that in rejecting the contract the company must act honestly and reasonably. I think the law is that so long as they act honestly that is all that is required. It is not for the jury to say whether they are unreasonable or not.

"His Honour: I am of the opinion that the charge as given is correct, and I decline to change my directions."

The questions submitted and the jury's answers read:—

"1. Were the sods laid by the plaintiff equal to the sample? A. Yes.

"2. Did the defendant's agent Porter act honestly in rejecting the sods furnished by the plaintiff? A. Yes.

"3. Did the defendant's agent Porter act reasonably in rejecting the sods furnished by the plaintiff? A. No.

"4. Were the sods of such a condition and so laid that by the addition of patching in the way described by the plaintiff in his evidence the whole would constitute a first-class job? A. Yes.

"5. What were the damages sustained by the plaintiff by reason of his not being permitted to carry out his contract? A. \$500.

The reasons for judgment read:—

"With some doubt as to the condition of the law in this matter, I think that I should enter judgment in favour of the plaintiff. I therefore enter judgment on the answers of the jury to the questions in favour of the plaintiff against the defendant for \$500 damages and costs of the action."

The question before us then is: Must the defendant, in rejecting an article which the contract stipulates shall be satisfactory to it, act not only honestly but reasonably according to the jury's view of reasonableness—or reasonably according to its own view?

I have read the cases cited and many others found collected in Halsbury's Laws of England, vol. 7, p. 433—the leading case on one side being *Andrews v. Belfield* (1857), 2 C.B.N.S. 779, and on the other side *Dallman v. King* (1837), 4 Bing. N.C. 105; also the cases collected in Benjamin on Sale, 4th Am. ed., pp. 74, 75; and the cases in 13 Corpus Juris, pp. 675 to 678 (the English cases are reviewed in a comparatively recent case of *Diggle v. Ogston Motor Co.* (1915) 84 L.J.K.B. 2165), and am of opinion that the effect of the decisions in England and the United States is correctly and accurately stated in the following extracts from 13 Corpus Juris:—

"Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes: (1) Where fancy, taste, sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not" (p. 675).

"*Cases of Operative Fitness or Mechanical Utility.* The rule stated in the preceding section is also applied to cases of operative fitness or mechanical utility when the contract clearly provides that performance shall be satisfactory to the promisor" (p. 676).

"*Bad Faith.* It would seem that, where the subject-matter of the contract involves a question of individual taste or sentiment rather than of utility, the good faith of the party declaring his dissatisfaction cannot be inquired into. But where the subject-matter of the contract relates to a thing which is ordinarily desirable only because of its commercial value or its mechanical fitness, it is held

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that the party must act in good faith, and must be honestly dissatisfied" (p. 678).

I am of opinion that all the cases turn on the interpretation of the contract, that this appeal also turns on the construction of the contract, and that, according to the true intent and meaning of the parties as expressed in the writing, the condition in this contract is one which makes the view, opinion, or judgment of the promisor final, if honestly arrived at. The jury have found that the disapproval was an honest exercise of the power given the purchaser by the agreement; and, although the jury were of opinion that the defendant, in its judgment, acted differently from the way they, as reasonable men, would in the same circumstances have acted, there is, I think, no power in them or us to substitute their judgment for that of the judge chosen by the contract.

I would allow the appeal with costs.

Both parties acted honestly and in good faith, and this dispute is the result of an honest and in my view reasonable difference of opinion: on the argument the defendant agreed that the plaintiff was entitled to \$117 for grading, and in the circumstances I would direct that the judgment appealed from be varied by reducing the sum awarded to \$117, without costs.

MULOCK, C.J.O., and SMITH, J.A., agreed with FERGUSON, J.A.

MAGEE, J.A., agreed in the result.

*Appeal allowed.*

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LATIMER V. FOSTER TOBACCO CO. LTD.

*Contract—Sale of Tobacco—Authority of Agent of Buyer—Undisclosed Principal—Contradictory Evidence—Judgments in Former Actions—Res Judicata—Third Party—Indemnity—Credibility of Witnesses—Conduct and Demeanour—Appeal from Finding of Trial Judge on Question of Fact—Duty of Appellate Court—Right of Action—Relief against Liability—Form of Judgment—Payment into Court.*

These actions, in which the plaintiffs were farmers who grew and sold tobacco and the representatives of an insolvent firm of dealers in tobacco, which traded under the name of the D. Tobacco Company, and the defendants were the M. company, the F. company, and J.,



were brought to recover payment for tobacco sold by the farmer-plaintiffs, under contracts made with them in 1919, through the instrumentality of D., who was employed by the D. company as buyer and who used the printed forms of contracts of the D. company and the F. company:—

*Held*, that the question arising in these actions between the D. company and J. was *res judicata* by the judgments in three former actions brought by other plaintiffs to which the D. company and J. were parties, although the judgments against J. in those actions were obtained under a third party claim for indemnity made by the D. company against J.; so that D.'s general authority to buy tobacco for J. and J.'s improper inducement to D. to accept such authority and to act in breach of his duty to his employer were not open to question in the present actions as between the D. company and J.

Where a judgment for indemnity has been pronounced between two parties on the ground that one was the principal and the other the agent, the judgment is conclusive as to that fact.

*Held*, also, that, as between the D. company and J., the contracts of the vendor-plaintiffs were made by D. in pursuance of the authority given him by J.; and, all parties being before the Court and the vendor-plaintiffs consenting, J. should be ordered to pay into court the whole amount for which the D. company was liable to its co-plaintiffs on contracts made with them by D. in the name of the D. company, and that the amount should be paid out to the vendor-plaintiffs in satisfaction of their claims against the D. company.

*Boyd v. Robinson* (1891), 20 O.R. 404, and *Mewburn v. Mackelcan* (1892), 19 A.R. 729, followed.

In the earlier actions it was found by the trial Judge that J. was the undisclosed principal, because he had authorised D. to make the contracts there in question for him. In the present actions the vendor-plaintiffs were different, the issue was not *res judicata*, and the trial Judge had found that J. was not the undisclosed principal and never authorised D. to make these contracts for him, and dismissed the actions:—

*Held*, that on appeal from these findings it was the duty of the Court to consider the whole evidence and the surrounding circumstances with the reasons stated by the trial Judge, and it was open to the Court to reverse the findings if convinced that they were not sustained by the evidence.

*Borrowman v. Permutit Co.*, [1925] S.C.R. 685, and *Wilson v. Kinnear*. [1925] 2 D.L.R. 641, followed.

The effect of findings as to the veracity of witnesses and their conduct and demeanour in the witness-box considered.

And *held*, reversing the judgment of the trial Judge, that all the purchases made by D. in question in these two actions were made by D. in pursuance of J.'s instructions.

As it was not within the scope of J.'s authority to make a contract with D. that involved a violation of his contract with the D. company, the M. company, J.'s principal, could not be *held* liable upon the contracts made upon the D. company's forms, but J. was liable on these to the vendor-plaintiffs in the *Plumb* action as to the contracts on the F. company's forms, and the M. company was liable to the vendor-plaintiffs in the *Latimer* action.

The D. company was entitled to be relieved by J. against liability on the contracts.

THESE actions were brought by farmers who grew tobacco and by the Dominion Tobacco Company, a partnership, the persons com-

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posing the partnership, and the trustee in bankruptcy of the partnership, against the MacDonald company, the Foster company, and George Jasperson, to recover payment for tobacco sold by the farmer-plaintiffs, under contracts made with them in October, 1919, through the instrumentality of one Henry Deacon.

Three actions had been previously brought by other tobacco-growers upon similar contracts: see *Peterson v. Dominion Tobacco Co.*, *Stevenson v. Foster Tobacco Co.*, *Vamparys v. Dominion Tobacco Co.* (1921-22), 19 O.W.N. 463, 22 O.W.N. 99; *Jasperson v. Dominion Tobacco Co.*, [1923] A.C. 709.

The actions brought by Plumb *et al.* and Latimer *et al.* were tried together by MEREDITH, C.J.C.P., without a jury, in 1924.

W. N. Tilley, K.C., and G. T. Walsh, for the plaintiffs Plumb *et al.*

Tilley, K.C., and J. G. Kerr, K.C., for the plaintiffs Latimer *et al.*

E. C. Cattnach, K.C., for the defendant W. C. MacDonald Regd.

L. E. Awrey, for the defendant the Foster Tobacco Company.  
 J. H. Rodd, K.C., for the defendant Jasperson.

December 31, 1924. MEREDITH, C.J.C.P. (in the PLUMB case):—If the testimony of the witness Henry Deacon be true, I can, at the moment, perceive no good reason why the vendor-plaintiffs should not have judgment directly against the defendant George Jasperson as the actual buyer of the tobacco, or for having, in conjunction with this witness, induced them to enter into a false contract in which the Dominion Tobacco Company were untruly named as purchasers, and for the purposes of this trial I assume that they may. I cannot think that, because they may be—if they really are—entitled to recover from the tobacco company, not because they really made the contract but because they are estopped from succeeding on a defence that they did not, they can recover in that way only.

But I can perceive no ground on which they can recover against the defendant W. C. MacDonald Regd., because this witness has not proved any authorisation of him to buy for that company by any one.

Whatever his testimony may have been on any other occasion, at this trial the whole burden of it was that he was to buy for the defendant Jasperson.

Q. "You mean? A. Dominion Tobacco. He said you will be able to buy for me the same as in 1918.

"Q. Had you bought for him in 1918? A. Yes.

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"Q. For the MacDonald company. A. For Mr. Jasperson. At this particular time Mr. Jasperson was in the office, and in speaking of buying tobacco I told him I had no form other than the Dominion Tobacco Company; Mr. Jasperson told me these forms were all right to use. He said, 'I don't want my name to appear on the forms.' He said the Dominion Tobacco Company forms are all right, in doing that you will be able to buy a lot of tobacco, buy it identically the same as I was for the Dominion.

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"Q. In 1918 did you buy it the same way? A. Yes.

"Mr. Rodd: "I do not suppose we are concerned with 1918.

"His Lordship: It cannot do any harm.

"Witness: The way I did it in 1918, Mr. Jasperson came to me and told me he was representing a company, which he never represented up to that time, and he told me, as I worked for him, it would be a good thing for me to buy tobacco for him.

"Q. What instructions, if any, did you receive as to the amount you were to buy? A. Received no instructions as to the amount. Mr. Jasperson told me he wanted a large quantity; he said go ahead and buy all you can get; all the tobacco you have over them that will be for me.

"Q. Tell me what he said, please? A. The only thing he said at that time, as I was buying for the Dominion Tobacco Company, it would be an easy matter for me to do the same as I did in 1918, to buy tobacco for him.

"Q. Had you instructions before you bought, or did you just buy it and trust to his taking it off your hands? A. No, sir, I bought it under his instructions. He instructed me to buy it. He said he wanted a large quantity of tobacco and 'I want you to go ahead and buy it the same as you did in 1918.'

"Q. What about Foster? A. I had no instructions; I was buying for Mr. Jasperson."

And assuredly the defendant Jasperson had no authority from the MacDonald concern to authorise any one to buy for them, in the disgraceful, if not criminal, manner in which alone the witness Henry Deacon bought.

If, therefore, that witness testified truly at this trial, the vendor-plaintiffs are entitled to some relief in this action.

On the other hand, if he testified falsely, what other logical or reasonable conclusion can be come to than that these actions should be dismissed?

During this trial excellent opportunities were given to me for considering the question of the credibility of the witnesses: they were examined, cross-examined, and re-examined, at much length,

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standing quite near to me and under my closest constant observation. And, although at the beginning of the trials I knew nothing of those cases, yet, as something was then said that indicated that much might depend on the question of credibility of witnesses, that question was ever present to my mind throughout the trial, and no opportunity that I could perceive, for most careful consideration of that question, was lost.

My conclusion upon it, as to the witness Henry Deacon—a conclusion reached without any kind of doubt—was, and is, that he is not a credible witness: that he would not, and did not, hesitate to make false statements whenever he thought that his interests could be advanced in that way.

As to the defendant Jasperson, his testimony was given with a certain amount of brusqueness and with a distinct undertone of resentment, as if he deemed himself a wronged man, things which might prejudice some minds against him; but I was unable to find any good reason for doubting his veracity.

So that, if the case had to be determined on the testimony of the two men only, my finding must be against the plaintiffs—quite irrespective of any question of onus of proof.

Though, of course, onus of proof of the extraordinary story upon which the plaintiffs rely is a heavy handicap.

But, fortunately, the case is not one which has to be determined on the conflicting testimony of two witnesses only. Fortunately few—if indeed any—cases are reduced to such a strait as that.

If I believe the testimony of the witness Deacon, I must disbelieve the testimony of five reputable witnesses, who really have nothing to impel them to testify to anything but the truth and the whole truth.

It should be unnecessary, but it may be advisable, to go further into this matter, and to ask and answer the questions: What sort of a man is it who asks that his testimony be accepted as true and that the testimony of those five witnesses, and of the defendant Jasperson, be rejected as false; and what the character of the testimony, so to be believed?

If his testimony be believed, he is a dishonest servant, faithless and false to his employers; a servant who did not hesitate to do that which may not unreasonably be termed commit numerous moral forgeries of his employers' name, wrongs which he now contends made them legally liable for hundreds of thousands of dollars, for which they got nothing and were never to get anything; and all that without any pretence of any real authority or any kind of excuse.

By falsehood he induced tobacco-growers—a good many of

whom are plaintiffs in this action—to enter into contracts to sell their tobacco to the Dominion Tobacco Company, not only without any real authority to buy it for that “company,” or in any way to use its name in connection with such purchases—his limited right to buy being vastly exceeded—but, according to his testimony, without any intention that they should be the purchasers, or have anything to do with the purchase. Doubly false and fraudulent: to the growers who were foolish enough to trust him, and to his employers who had trusted him.

If his testimony were true, then the defendant Jasperson was the real buyer.

And it is such a witness as this who asks me to believe him and to brand as false swearers the six other witnesses I have referred to. The thing’s preposterous.

The testimony of this witness—Henry Deacon—ended thus:—

“Q. And upon that you went and deceived these farmers? A. If that is the way you—

“Q. Your way? A. I certainly deceived them.

“Q. You are not trying to deceive me now? A. No.

“Q. You are asking me to believe you and disbelieve Brown? A. Yes.

“Q. Asking me to believe you and disbelieve Copeland? A. Yes.

“Q. Asking me to believe you and disbelieve Bon Jasperson? A. Yes, in some things.

“Q. Asking me to believe you and disbelieve Mrs. Gascoyne? A. Yes.

“Q. And believe you and disbelieve Mr. Goodeve? A. Yes.”

And now, whether needful or not, I proceed, for the purpose of making some observations: on the character of the testimony to which I have referred; on the circumstantial evidence; and on the probabilities of the matter.

The plaintiffs rely on the testimony of the witness Hall, who is a railway employee at a small railway-station in the tobacco district. I saw no reason for considering him anything but a credible person, and a fair one in the manner of giving his testimony. He said that some time in the tobacco-buying season of 1919, the defendant Jasperson, in a casual conversation, had told him that Henry Deacon would make “pretty fair,” that he’d make \$3,000 or \$4,000, and that he thought that Jasperson said he was buying for him. He was fair enough to call attention to the character of the conversation—that it took place five years ago.

It will be observed that the first part of the statement favours the defendants rather than the plaintiffs. If Deacon were buying for Jasperson at a profit or commission of a quarter of a cent a

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pound, the sums named should be much more than it was possible for him to make, whilst if he were buying on his own account the sums named might be well considered a pretty good guess.

The defendant Jasperson, an agent of the MacDonald concern, did buy a very considerable quantity of tobacco from the witness Henry Deacon; and it is quite easy to perceive how a misunderstanding on Hill's part might have occurred, even if he were sure of what was said to him casually, about a matter in which he had no personal concern, five years ago.

Under no circumstances could this testimony have any great weight; in the circumstances of this case, and having regard especially to the infinitely better evidence in it, it has none.

Then several witnesses were called to prove that the witness Henry Deacon had been seen at or going to the defendant Jasperson's house on some occasions, but not many in all; and that Jasperson had been seen on some occasions at the Foster Tobacco Company's factory, where Deacon was or had been factory foreman. As to a number of these occasions the witnesses were unable to say whether the men met or saw each other, or not.

The witness Henry Deacon had, as I remember the evidence, lived for the 10 years before he came of age, in the defendant Jasperson's house; they were both this year engaged in buying tobacco in large quantities on a wild market. Jasperson in this year had negotiations with Deacon with a view to Deacon buying from Jasperson a quantity of "black" tobacco, and with a view to Jasperson acquiring from or through Deacon some rather expensive tobacco-crates, and, for the MacDonald concern, Jasperson had bought from Deacon and taken delivery of, and paid for, a large quantity of "Virginia" tobacco.

Under all these circumstances, it did, and does, seem to me that the plaintiffs are hard pressed indeed for evidence, when they rely so much upon evidence of this character. It is seldom that one is so forcibly reminded of the story of the lady, the sheriff, and the lap-dog. It should have been strange indeed if these two men had not actually met, during that season, more frequently than it was proved they did meet..

The testimony of the witness Henry Deacon, that they met nightly and went over lists of his purchases, is wholly uncorroborated and is untrue. If there were any truth in it, it could have been proved by others, including the members of Jasperson's household, with whom, it is said, Deacon lived for 10 years. They must have known, but no attempt was made to prove it, except in the way I have mentioned; and it is inconsistent with the witness Deacon retaining all the contracts and afterwards dividing them

as he saw fit as if he were sole owner of them. The circumstance that the MacDonald concern took a large quantity of "Virginia" tobacco aids rather than harms the defence. It was bought from the witness Henry Deacon; and so independent was Deacon in regard to the sale of it that he in effect threatened the MacDonalds' inspector, that if he were not "easy" in his inspection the MacDonalds would not get it.

The character of the evidence on the other side is quite different: it was given by credible, disinterested, reputable witnesses, direct to the point; that the witness Henry Deacon, instead of pretending that he had bought for Jasperson or the MacDonald concern, distinctly said that he had not.

And yet I am asked to believe his testimony now; that he did buy for Jasperson, and that all the witnesses against him have knowingly sworn to what was untrue—to base, on the testimony of such a man, a ruinous judgment; giving effect to contracts involving hundreds of thousands of dollars, contrary to all that is in writing.

The story of the man is upon its face extremely improbable and stupid. So improbable and stupid that, if really made, some evidence in writing should have been insisted on, or some witness of it procured. There is not a scratch of a pen, or a word of direct testimony, except that of Henry Deacon himself, in support of it.

If it were true that Henry Deacon was to buy for the MacDonalds or for Jasperson, they or he were putting a somewhat reckless buyer into an abnormally rising market in competition with the MacDonald concern without letting their 16 or so buyers know. As is obvious, and as even Henry Deacon admitted, he was buying in competition with them, and, according to their chief buyer, was the worst competitor they had.

And they were, on a market that was going wildly against the buyers, making it falsely appear that there was another buyer of immense quantities of tobacco in the market, and so raising the prices.

The circumstances are consistent only with the truth, which is: that Henry Deacon, a young man with only that little knowledge which is said to be a dangerous thing, having had in mind speculating, was carried away by the excitement of a rapidly rising market; in a few years the price of tobacco there had trebled; and in the year in question had gone up from 30 to 40 and 50 cents a pound. It was an extremely rosy state of affairs, and Henry Deacon "plunged."

He was able to buy almost to his heart's content by concealing the limitation upon his authority to buy for the Dominion company

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and by making use of the name of the Foster Tobacco Company, of which he was "factory foreman" and a director.

And so really he bought nothing for the Dominion company or the Foster company, but all for himself; and when the time came was able to allot to the Dominion company just such contracts as he pleased, up to the limit of his authority to buy for them, and to sell to the MacDonald concern, through Jasperson, such as they were willing to buy, and did so.

But the unlooked for happened: the growers' 1919 rainbow of delight suddenly faded away; and the young speculator, instead of finding a pot of gold at its foot, found himself in the deep mire from which he at first told his pitiful tale to the witnesses who repeated it at this trial; but since then has grasped at every straw to extricate himself from the mire, and has stopped at nothing that he thought might get him out and put some one else in.

This conclusion was reached without the aid of the testimony of the witness Brown; that was not needed, but it accords with it closely. In the spring of the year 1919, the witness Henry Deacon proposed to him to join him in just such a speculation, saying that they could resell to the MacDonald concern or Jasperson.

Upon the whole evidence adduced at this trial, I could come to no other conclusion than that the plaintiffs' action wholly failed upon the merits and must be dismissed with costs, and gave directions accordingly some days ago.

And now I have to deal with a question of a different character: whether, all the plaintiffs having entirely failed upon the merits, and having had their action dismissed because there never was any liability on the part of either of the defendants to any one, they can recover because of a judgment in some other action respecting a different contract, between different parties, upon different evidence, in which there was held to be some liability on the part of the defendant Jasperson to the Dominion Tobacco Company. It should be, certainly, one of the curiosities of the administration of justice if they can. It, assuredly, would be one of such curiosities, if I should, in these two cases, tried together as one, upon, substantially, precisely the same evidence, make inconsistent findings of fact and direct the entry of different judgments on the one from the other—"make fish of one and flesh of the other," "paint one black and the other white."

First having compelled the Court to try these cases on the merits, and to determine the question whether authority was given by the defendants Jasperson and the MacDonald company or either of them to the witness Henry Deacon to buy for them or either of them, and it being proved and found that he had not authority, and



my judgment having gone that he had not, I am now to give judgment for the plaintiffs on the ground that he had.

The vendor-plaintiffs, having elected to sue on the ground that the contracts were not those of the Dominion Tobacco Company—as in truth they were not, but were the contracts of the defendants falsely made in the name of that company—should not be permitted now to assert liability on the part of that company in order, in a roundabout way, to make the defendants liable though in truth—as has now been found against these plaintiffs upon this trial—they never were. And if relief could be given by way of estoppel, yet the actions against the defendants as purchasers should be dismissed.

Then the claims so made are for damages sustained by the Dominion Tobacco Company for the wrongful use of their name; but they have sustained no damages in any of these cases; they are not sued; and no such claim is made against them; the only claims made are against the defendants the MacDonald concern and Jaspersen.

The other action, which it is contended operates as an estoppel, was brought against the company, and judgment went against them in it; and it was because of that that relief against Jaspersen, who was a defendant in that action, was given; but given against him as a tort-feasor only. To treat this feature of the case as one for indemnity in contract, instead of one for reasonable compensation, in damages, in tort, should be out of the question.

If any of these vendor-plaintiffs could bring an action against the company on the ground of estoppel in pais, the one ground upon which the plaintiffs succeeded against them in the other action, it by no means follows that any of these vendor-plaintiffs could recover, for none of them may have been misled by anything the company permitted the witness Henry Deacon to do, or took no steps to prevent him doing in their name to their knowledge. In the other case, advertisements published by Henry Deacon seem to have been the estoppel, but that could not estop unless known to the company and unless they misled the seller. Each case is necessarily a separate one, to be determined upon the evidence adduced in it alone.

Sellers who sell to a new man in the field as a buyer to the extent of about half a million dollars' worth—a new man without means to pay, and who buys without making any down-payment—and sellers who make no inquiry as to the buyer's authority, have themselves much to blame for their losses, especially in such a case as this, in which any kind of reasonable inquiry should have discovered Henry Deacon's want of authority and dishonesty and have

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saved all the loss and trouble that that want of authority and dishonesty have caused. They can have no good reason for fault-finding, because they can obtain compensation for their losses from no one but the man they let deceive them.

As to the claim for a declaratory judgment, is it needful to say that such a judgment in such an action as this is out of the question? The Dominion Tobacco Company could have no legal claim against the defendants until the company had sustained damages by their wrong. And when they have sustained damages their action must be to recover such damages. It would be a manifest absurdity to make a declaratory judgment instead of a final judgment for the amount of their damages.

Whether the vendor-plaintiffs have now a right by action against the Dominion Tobacco Company cannot now be considered; the company are not defendants, and no such case is or could be made against them in it. It shall be time enough to cry out when they are hurt. No claims have yet been made against them; no proceedings taken. When a claim is made, if ever, in the Court of Bankruptcy, or in this or any other Court, it should be tried out there; and, if successful, the question of the measure of damage must be considered there.

The action fails in all respects.

Judgment in the LATIMER case was given on the same day:— This action was tried with the action of *Plumb and others v. W. C. MacDonald Regd. and another*, as if they were one action, and that which I have said in the other action makes it plain that the plaintiffs fail in this action also; but there are some material differences between them to which some reference should be made.

In this case the contracts were made by the witness Henry Deacon in the name of the Foster Tobacco Company Limited; and they are defendants in this action. So that the first question which arises is: whether those defendants are in any way bound by such contract. That they are not seems to me to be very plain.

When these contracts were made, the company was in a hopeless state of insolvency, as all persons connected with it, including the witness Henry Deacon, well knew.

It would have been a very reprehensible thing for them to do, if they attempted to buy. A new company was thought of, but no one had any thought of reviving this company; it was to pass out of actual existence, if it had not already done so.

The by-laws of the company provided that no purchases of tobacco should be made by or for the company except on the orders of the board of directors.

The witness Henry Deacon was not the manager of the company; he was only factory foreman, who was not a buyer, but he was also one of the board of directors of the company.

He had no authority to buy for the company, not to mention buying falsely in their name for another or others.

In all things in which he and the witness Brown differ in their testimony, I accept the testimony of the witness Brown and reject the testimony of the witness Henry Deacon, finding him to be the much less credible witness.

There was no actual authority; and there is nothing that in any way estops these defendants from having the benefit of the truth in this respect.

As to the defendants the MacDonald concern, there is nothing, as there was nothing in the other case, in the testimony connecting them with any wrongful use of the name of the Foster company.

Nor is there in this case, as to the defendant Jasperson.

I have already quoted from the reported testimony of the witness Henry Deacon at this trial, and add this only:—

“Mr. Tilley: Well then, did you get all the contracts on the Dominion forms or were some on the Foster forms? A. In the first place I bought on Dominion Tobacco Company’s forms which I shewed Mr. Jasperson, for the reason Foster company’s forms were not out of the printer’s hands.

“Q. Did you tell Mr. Jasperson? A. That is not clear in my memory whether I told him the Foster forms were not out of the printer’s hands. I remember giving Mr. Jasperson Dominion Tobacco Company’s forms; I told Mr. Jasperson these are the only ones I have.”

I find that the defendant Jasperson was in no way a party to the use by the witness Henry Deacon of the name of the defendants the Foster Tobacco Co. Ltd.; and that he had no knowledge of it.

It was not said by the witness Henry Deacon that the defendant Jasperson was shewn or saw any of the contracts made in the name of this or of the other company; if it had been, I should find it to be untrue; what was said was that the purchases were reported to him; and I find that that was untrue.

I have not overlooked the possibility of there having been two “plungers:” of the witness Henry Deacon having made a proposition to the defendant Jasperson, like that which he made to the witness Brown, and which was rejected by him somewhat scornfully, and of the defendant Jasperson having accepted it—that they two conspired to be unfaithful to their employers and to deceive all the tobacco-growers they could.

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But that, though possible and though consistent with some of the circumstances of the case, is entirely opposed to the whole of the testimony and inconsistent with some of the circumstances, for instance, the conduct of the witness Henry Deacon in retaining all the contracts and dividing them as if they were his alone, giving the defendant Jasperson no choice or voice respecting them.

I went into the cases as fully and as carefully as it was possible for me to do; and I now come out of them without any kind of doubt as to the rights and wrongs of all concerned in them.

And I have carefully abstained from learning what was said or done in the other action or actions, occasionally mentioned. For any Judge to allow himself to be influenced, in finding the facts in these actions, by anything done or said in the other cases, would be to deprive the parties to these actions of a fair trial and a verdict in accordance with the evidence adduced in them. To borrow from, or be led by, what was done or said in the other cases, should be too obviously contrary to elementary principles in the administration of justice. If these cases were tried, as they might have been, by a jury, it should have been manifestly improper to have allowed any such evidence to be given, or even statements to be made that there had been such other cases: and all Judges should be equally guardful against such improper influences when acting as if jurors.

For these reasons, I, some days ago, directed that judgment be entered in this action, also, in favour of the defendants, dismissing the action with costs.

The plaintiffs appealed from the two judgments of MEREDITH, C.J.C.P.

September 21-25, 1925. The appeals were heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

*W. N. Tilley*, K.C., and *G. T. Walsh*, for the appellants, contended that the trial Judge was wrong in his findings of fact, and that it is the duty of an appellate court to review the findings of fact of a trial Judge. The question of liability to the plaintiffs, as between the Dominion Tobacco Company and Jasperson, is *res judicata* and cannot be reopened here. It is permissible to go outside the record to determine what, as between the parties, may be taken to have been decided by a judgment. The contract between Jasperson and the Dominion Tobacco Company is not one to indemnify from a money payment, but to relieve from a liability. A plaintiff who alleges that he is entitled to be indemnified by a defendant, and who admits that he is himself liable to a co-plaintiff,



may ask the Court to compel the defendant to discharge the plaintiff's obligation to his co-plaintiff. The defendant Jasperson, in his dealings with Deacon, was acting within the scope of his authority as an agent of W. C. MacDonald Regd., and his principals are bound. Even if Jasperson acted fraudulently, he bound his principals, as long as his conduct was not fraudulent as against his principals. Reference to *Wilson v. Kinnear*, [1925] 2 D.L.R. 641; *Jasperson v. Dominion Tobacco Co.*, [1923] A.C. 709; *Regina v. Inhabitants of Hartington Middle Quarter* (1855), 4 E. & B. 780; *Green v. Smith* (1921), 21 O.W.N. 253; *Re Ontario Sugar Co.*, *McKinnon's Case* (1910), 22 O.L.R. 621 and (1911) 44 Can. S.C.R. 659; *Allan v. McTavish* (1883), 8 A.R. 440; *Barber v. McCuaig* (1900), 31 O.R. 593; *Borrowman v. Permutit Co.*, [1925] 3 D.L.R. 113; *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716. Discussion of the evidence.

*J. H. Rodd*, K.C., for the respondent Jasperson, contended that the doctrine of *res judicata* could not be invoked here because the previous judgment was not recovered in an action between the same parties nor in respect of the same subject-matter. The right of the plaintiffs against Jasperson is only a claim to be indemnified. They cannot succeed on a claim arising out of contract. Their only possibility of succeeding would be in an action against Jasperson in tort. The doctrine of estoppel cannot be extended to give to the tobacco-growers the benefit of an estoppel in favour of their co-plaintiff, the Dominion Tobacco Company. The trial Judge did not misapprehend the facts, and there is no duty cast on this Court to review his findings. The *Borrowman* case is readily distinguishable from this. Reference to *General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society* (1878), 10 Ch.D. 15; *Salmond on Torts*, 6th ed., p. 94; *Halsbury's Laws of England*, vol. 13, paras. 450, 465, 478; *Everest and Strode on Estoppel*, 2nd ed., pp. 5, 8, 9, 10, 11, and 56. Discussion of the evidence.

*I. F. Hellmuth*, K.C., and *E. C. Cattanaach*, K.C., for the respondent W. C. MacDonald Regd., contended (discussing the evidence) that the trial Judge's findings of fact were correct. A finding of fact based on an opinion formed as to the credibility of a witness should not be disturbed by an appellate court, except in extraordinary circumstances. The question of *res judicata* and estoppel do not affect W. C. MacDonald Regd. Reference to *Wood v. Haines* (1917), 38 O.L.R. 583 (P.C.)

*Tilley*, K.C., in reply.

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1926. judgments of Meredith, C.J.C.P., at the trial, delivered on the 31st  
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The plaintiffs, other than the authorised trustees of the estate of the Dominion Tobacco Company and the three Goldsteins composing that partnership, are farmers who grow tobacco, and these actions arise out of sales by them of tobacco in October, 1919, on written contracts made by one Deacon. In the *Plumb* case, these contracts purport to be made between the respective farmers as vendors and the Dominion Tobacco Company as purchaser. In the *Latimer* case, the contracts purport to be made between the respective plaintiffs as vendors and the Foster Tobacco Company Limited as purchaser.

The defendant Jasperson was a dealer in tobacco, and in 1918 was agent for the purchase of tobacco for the defendant W. C. MacDonald Regd., and employed Deacon as a sub-agent to make such purchases for him in Deacon's own name. In 1919, Jasperson was again agent for the purchase of tobacco for the MacDonald company, with very wide authority, including that of appointing sub-agents, and he testifies that everything he did in connection with the purchase of tobacco in 1919 was on behalf of the MacDonald company. Deacon was a young man who had been employed by Jasperson for a number of years prior to reaching the age of about 20 years, and who continued on intimate terms with Jasperson afterwards. He was foreman for the Foster company, which had bought out Jasperson's manufacturing business, but which in 1919 was drifting into insolvency and doing so little business that the president and general manager, Brown, had ceased to give any attention to the conduct and operation of the business, and had left the whole management and operation in the hands of the foreman, Deacon. On the 10th June, 1919, the Dominion Tobacco Company, by agreement in writing, engaged Deacon to buy tobacco for them, for which they were to pay him 50 cents per 100 lbs., Deacon agreeing not to act as tobacco-buyer for any one else, except the Foster company, without the consent of the Dominion company. By subsequent correspondence, the quantity to be bought by Deacon under this contract was limited to 300,000 lbs. burley tobacco and 75 000 lbs. Virginia. Deacon says that he told Jasperson of this contract with the Dominion company and its terms, when Jasperson told him that he was still acting for the MacDonald company, which wanted a large quantity of tobacco, and engaged him to go on and buy for him, Jasperson, all he could over the small amount that the Dominion company required, without using the name of Jas-

person or MacDonald, and expressly approved of the use of the Dominion contract forms which he (Deacon) shewed to Jasperson. Deacon purchased in all about 1,100,000 lbs. of burley tobacco, part on the contract forms of the Dominion company and part on the forms of the Foster company, which, as stated, purported to make these companies respectively the purchasers.

Deacon, when he completed his buying, allotted to the Dominion company, out of the total contracts on the Dominion forms, sufficient to make up the quantity which that company had instructed him to buy, and the balance on these forms and all on the Foster forms he put on a list which he presented to Jasperson as a list of contracts for tobacco made for him. Jasperson then, according to his evidence, but at a later date according to Deacon, repudiated these contracts and denied that Deacon had any authority from him to make them.

Two actions arising out of contracts made by Deacon on Dominion forms and one out of a contract made by him on a Foster form have already been tried and disposed of, all three having been tried together.

One of the former was by George Peterson, plaintiff, against the Dominion Tobacco Company and George Jasperson and W. C. MacDonald Regd., defendants, in which the Dominion Tobacco Company, in the event of its being held liable to the plaintiff, claimed indemnity over against the defendant Jasperson as a third party, under the Rules. The other was by Charles Vamparys, plaintiff, against the Dominion Tobacco Company, George Jasperson, and Henry Deacon, defendants, in which the Dominion Tobacco Company made the same claim for indemnity over against Jasperson. The action on a contract on the Foster form was brought by David B. Stevenson, plaintiff, against the Foster Tobacco Company Limited, George Jasperson, and W. C. MacDonald Regd.

In all three cases the question of liability of Jasperson and W. C. MacDonald Regd. depended on whether or not Deacon had been authorised by Jasperson to buy for him, as asserted by Deacon. The evidence was contradictory, and the learned trial Judge made his finding on it as follows: "I do not propose to go through the evidence in this case in detail, but merely say that most careful and anxious consideration of the whole evidence, oral and documentary, has convinced me that I ought to give credit to the evidence of Deacon both as against Jasperson and Stewart. The conflict of evidence between Deacon and Stewart is of no moment save in so far as it may aid in the solution of the main question, namely, whether Deacon was employed to purchase by Jasperson as he says."

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The learned Judge further said: "It appears to me that the true situation is that the Dominion company is liable for all the contracts entered into in its name, because Deacon was held out as its purchasing agent, and the limitation as to the quantity he must purchase was not in any way disclosed. He was acting within the apparent scope of his agency in his purchases. The plaintiffs (referring to the plaintiffs Peterson and Vamparys) are therefore entitled to recover against the Dominion company. The Dominion company has, as I think, a right of relief over against Jasperson, who procured Deacon to violate his duty towards his employers by taking contracts in the name of the Dominion company." He further held that this was without the knowledge of the Dominion company, and that the purchases made by Jasperson through Deacon in the name of the Dominion company were not for it. The formal judgments are in accordance with these findings.

Stevenson was given judgment against Jasperson, and the action was dismissed as against the Foster Tobacco Company on the ground that Deacon was acting for Jasperson and using the Foster company's name as agent for Jasperson.

There were appeals to a Divisional Court. Jasperson appealed in all three cases. The Dominion Tobacco Company appealed from the two judgments against it, and contended that, instead, there should have been judgment for Peterson direct against the MacDonald company and for Vamparys direct against Jasperson or Deacon. Peterson and Stevenson both appealed from the dismissal of the actions as against the MacDonald company.

These appeals were all disallowed, and Jasperson appealed in the *Peterson* case to the Privy Council and in the other two cases to the Supreme Court of Canada. The Privy Council dismissed the appeal in the *Peterson* case, and that of course practically disposed of the other appeals.

Lord Haldane, in delivering judgment (*Jasperson v. Dominion Tobacco Co.*, [1923] A.C. 709, at pp. 711, 712), says:—

"The learned trial Judge has made certain findings of fact in which the Court of Appeal have concurred, and which their Lordships have no reason to question. The material findings are that Deacon was instructed by Jasperson to purchase for him a large quantity of tobacco in the names of the Dominion and Foster companies; that he reported to him purchases so made from day to day during the buying season, and that these were all approved by Jasperson. In the names of the Dominion and Foster companies, Deacon in this way purchased tobacco amounting to 1,100,000 lbs. Out of this amount he handed 300,000 lbs. to the Dominion com-



pany. The remainder, amounting to 800,000 lbs., he proffered to Jasperson, but the latter repudiated the arrangement."

The plaintiffs in the present action of *Plumb et al. v. W. C. MacDonald Regd. et al.* are farmers who sold tobacco to Deacon on contracts on the Dominion form, which contracts on their faces purported to be made by the Dominion company as buyers, and were allotted by Deacon as contracts made by him for Jasperson, under the authority which he alleges Jasperson gave him. The learned trial Judge in this action and in *Latimer et al. v. Foster Tobacco Co. Ltd. et al.* comes to precisely the opposite conclusion to that reached by Mr. Justice Middleton in the three former actions referred to. He disbelieves Deacon and believes Jasperson and finds that Deacon never received any authority from Jasperson to purchase tobacco for him on Dominion forms or otherwise.

The Dominion Tobacco Company contends that, as between it and Jasperson, that question of fact was not open to the learned trial Judge, because it became *res judicata* by virtue of the judgments in *Peterson v. Dominion Tobacco* and *Vamparys v. Dominion Tobacco Co.* It appears to me that this is clearly so. In these cases the Dominion Tobacco Company claimed indemnity over against Jasperson on the ground of its incurring liability by the unauthorised use of its name in the contracts by Deacon acting on behalf of Jasperson and on his instructions. The Dominion Tobacco Company obtained judgment against Jasperson in both actions, as shewn by the quotations I have already made from the judgments of Middleton, J., and Lord Haldane. That finding was not that Jasperson had given Deacon authority to make contracts for him in the way they were made with the particular plaintiffs in those actions, but that he had given that authority without regard to any particular individuals. In my opinion, therefore, the only question that was open to the learned trial Judge, as between the plaintiff the Dominion Tobacco Company and Jasperson, was as to whether the contracts of the other plaintiffs sued on were made by Deacon in pursuance of the authority adjudged to have been given him by Jasperson. There is no doubt that they were, if such authority was given by Jasperson, and, as already stated, I am of opinion that it is *res judicata* as between the Dominion company and Jasperson that there was such authority. It is argued, however, that, even if this is so, the Dominion company cannot recover because it has so far suffered no damages, inasmuch as it has not paid its liabilities on these contracts to its co-plaintiffs and is only entitled to be indemnified when it does pay, and to the extent that it pays, and, being now insolvent, it is never likely to pay. I am of

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opinion that Jasperson, having, as already adjudged, wrongfully induced Deacon, in violation of his duty to his employers, to enter into contracts which, though unauthorised by them, are binding on them by reason of that employment, and imposed on them a legal liability which arises by reason of such wrongful act, has furnished the Dominion company or those representing it in this action with a right of action against him for relief against the liability thus imposed on them by such wrongful act of his. Such relief, I think, can be given.

In the *Peterson* case the Dominion company obtained judgment against Jasperson for the amount for which the plaintiff recovered judgment against that company, though the Dominion company had not actually paid the plaintiff any part of the moneys. The only difference is that there the Dominion company was claiming, as defendant, against Jasperson, as a third party, protection against liability for a debt for which judgment was recovered against it in the action, while here it is claiming, as plaintiff, against Jasperson, as defendant, protection against liability for a precisely similar debt for which judgment has not yet been recovered. In both cases the wrong is the imposing on the Dominion company of a liability, and I can see no distinction between a definite liability resting on simple contract—the only question open being as to amount—and a similar liability that has become of record.

In *Boyd v. Robinson* (1891), 20 O.R. 404, the plaintiff, a retiring partner, took a bond of indemnity against liability for partnership debts, and judgment was recovered by creditors against the firm. The plaintiff, not having paid anything on the judgment, sued on his bond, and it was held that he had the right to sue without paying. Boyd, C., says (p. 408): "The judgment, however, should be so shaped as to protect the plaintiff and satisfy the creditors; and it should, therefore, be to pay the amount of the judgments into court and to pay the costs of this litigation to the plaintiff." And Meredith, J., says (p. 410): "There is no difficulty in moulding a judgment to meet the requirements of the case and to protect all parties; and the machinery of the Court is now quite sufficient to work out such a judgment."

In *Mewburn v. Mackelcan* (1892), 19 A.R. 729, the Court of Appeal confirmed a judgment by Armour, C.J., to the same effect, giving the same mode of relief. The principle laid down is that the indemnity is against liability and not against payment.

In *Sutherland v. Webster* (1894), 21 A.R. 228, the first question to be determined was whether or not there was any liability against which the plaintiff was seeking indemnity; and the case is

distinguished from such cases as *Wooldridge v. Norris* (1868), L.R. 6 Eq. 410; *Lacey v. Hill* (1874), L.R. 18 Eq. 182. App. Div. 1926.

The result is that the Dominion company is liable to the vendor-plaintiffs for certain sums, and Jasperson is under legal obligation to the Dominion company to protect it against that liability. With all the parties before the Court, and the vendor-plaintiffs consenting, as they do, I think the rights of all are worked out by a judgment direct against Jasperson ordering him to pay into court the whole amount for which the Dominion company is liable to its co-plaintiffs on contracts for purchase of tobacco made with them by Deacon on the Dominion company forms, with a reference to the Local Master to determine such amount if it cannot be agreed upon, such amount to be paid out to the vendor-plaintiffs in satisfaction of their respective claims against the Dominion company. PLUMB v. W. C. MACDONALD REGD. Smith, J.A.

The vendor-plaintiffs, however, seek to recover judgment direct in their own right against either Jasperson or W. C. MacDonald Regd., on the ground that one or other of them was the undisclosed principal for whom Deacon acted in making these contracts on Dominion forms. If they succeed in this contention, the right of the Dominion company to a judgment such as I have indicated disappears, because these vendor-plaintiffs cannot recover on their contracts against both the Dominion company and the undisclosed principal.

As already stated, it was found by Middleton, J., in the actions on contracts on both Dominion forms and Foster forms, that Jasperson was the undisclosed principal, because he had authorised Deacon to make these contracts for him, and this finding was concurred in by the Appellate Division and the Privy Council. The vendor-plaintiffs, however, are different in the present actions, and that issue is not here *res judicata*, and the learned Chief Justice in these actions has made a finding directly the reverse of that made by Middleton, J., and so concurred in, and holds that Jasperson was not the undisclosed principal and never authorised Deacon to make these contracts for him. He also holds that W. C. MacDonald Regd. was not the undisclosed principal, but that Deacon was himself the undisclosed principal.

This finding of the learned Chief Justice is appealed against by the plaintiffs, and the usual arguments are presented by the other side against interference with the decision of a trial Judge on the question of credibility and findings of fact.

In *Jarvis v. Connell* (1918), 44 O.L.R. 264, at p. 268, Riddell, J., delivering the judgment of the Court, says: "On the principle laid down in *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R.

App. Div. 502, and similar cases, we are bound to look at the reasons given by  
1926. the trial Judge, and if (p. 506) 'he has misapprehended the effect  
PLUMB of the evidence or failed to consider a material part of the evidence'  
v. we must apply our own minds to the determination of the facts;"  
W. C. and, "There is no rule forbidding us from disagreeing with the  
MACDONALD trial Judge even on questions of fact: *Dempster v. Lewis* (1903),  
REGD. 33 Can. S.R.C. 292." The trial Judge was accordingly reversed on  
Smith, J.A. his findings of fact, Kelly, J., dissenting.

In *Permutit Co. v. Borrowman*, [1924] Ex. C.R. 8, the trial Judge found certain facts, stating (p. 10) that the evidence "is clear, preponderant and conclusive, leaving the Court in no uncertainty," and (p. 11), "I have had the advantage of seeing these gentlemen on the witness-stand, to observe their demeanour and manner of testifying, and I have come to the conclusion to accept their testimony." His finding of fact was, nevertheless, reversed in the Supreme Court of Canada, *Borrowman v. Permutit Co.*, [1925] S.C.R. 685, [1925] 3 D.L.R. 113, on the ground that he had misunderstood the evidence and overlooked the weight and importance of facts either undisputed or indisputably established by documents or otherwise, and that in such circumstances it is the duty of the appellate tribunal to review the findings in the light of the whole evidence.

The Privy Council in *Wilson v. Kinnear*, [1925] 2 D.L.R. 641, at p. 646, has laid down the principle as follows: "It is quite evident that the Judge did not believe Mrs. Kinnear. Had the verdict been the verdict of a jury their Lordships think that it could not have been set aside. But the judgment of a Judge is in a different position. A court of appeal has not to consider whether there is any evidence on which the verdict could be reasonably based; it has to consider whether it, on the evidence, would have come to the same conclusion, and that is what the Appeal Court did."

It, therefore, becomes necessary to consider the whole evidence and surrounding circumstances with the reasons stated by the trial Judge.

The learned Judge (Meredith, C.J.C.P.) alludes to the careful consideration which during the progress of the trial he gave to the question of the credibility of the witnesses, and reaches, "without any kind of doubt," the conclusion that the witness Deacon, whom Middleton, J., had found to be credible, is not credible, and Jasperston, whom Middleton, J., had not believed, is credible.

As this question of veracity is not *res judicata*, I think we must here determine it on the record in these cases. There are fortunately few cases in which the credibility of witnesses has to be



determined by a trial Judge on conclusions drawn alone from the appearance and demeanour of these witnesses in the box. This may be an element of more or less weight according to circumstances, but at best is a very uncertain guide; as is well illustrated by these and the former actions alluded to, in which two of our most learned and experienced Judges have arrived at diametrically opposite views as to the credibility of these two witnesses after hearing them give the same evidence on the same matter in each instance. Conduct and demeanour are at all events of minor importance where the whole evidence and surrounding circumstances furnish guides of a more reliable nature. It is on such guides, rather than on the appearance and demeanour of the witnesses in the box, that the learned Judge bases his conclusions as to credibility and facts. He says that if he believes Deacon he must disbelieve the testimony of five reputable witnesses who really have nothing to impel them to testify to anything but the truth, and sets out in detail his own examination of Deacon (at p. 210 of the evidence), where he asks the question, "You are asking me to believe you and disbelieve Brown," and asks the same question as to Copeland, Bon Jasperson, Mrs. Gascoyne, and Goodeve. The witness was not told what the statements of these witnesses were that the learned Judge thought were contradictory of the evidence of the witness. In my opinion, counsel would not have the right to ask such questions: *North Australian Territory Co. v. Goldsborough Mort & Co.*, [1893] 2 Ch. 381, at p. 385. Here they, with the answers, are of no assistance or import. The question of how far these five witnesses contradict Deacon, and of who is to be believed where there is contradiction, must be determined by reference to the evidence.

In 1918, when Deacon was in the employment of the Foster company, Jasperson was agent to buy about 1,000,000 lbs. of tobacco for the defendant W. C. MacDonald Regd., and to secure this engaged sub-agents or buyers, and made a verbal arrangement with Deacon to buy tobacco for him, in Deacon's own name, on a commission of one-quarter cent per pound. Deacon, in pursuance of this, bought a quantity of tobacco in his own name, which Jasperson took for the MacDonald company and paid for, and for which he paid Deacon the commission, all of which Jasperson admits.

Deacon says he saw Jasperson within two weeks after the making of his contract with the Dominion company on the 10th June, and told him of it and its terms, and Jasperson then said that he was still representing the MacDonald company, and, as Deacon was buying for the Dominion company, it would be easy for him to buy for him, Jasperson, as he did in 1918. He said that

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the MacDonald company would want a large quantity, and, as Deacon was only to buy a small quantity for the Dominion company, it would help him (Jasperson) if Deacon would buy for him. Deacon says that he told Jasperson that he had no forms of contract but the Dominion forms, and Jasperson told him these were all right and to buy as he was doing for the Dominion, as he (Jasperson) did not want his name to appear; and that it was not a matter of forms but of getting tobacco. Jasperson denies that any shortage was anticipated, but Copeland, his chief buyer in 1919, says that the impression was that there would be a shortage, and they employed plenty of buyers (15 or 16) to get their share, and a further precaution was taken by making the price read on the contracts so much "and the raise." All the buyers had instructions, as Jasperson admits, to start buying on these terms, and Deacon swears that he was so instructed by Jasperson and acted accordingly. The fact that tobacco the previous year was bought at 15 to 30 cents and ran up in 1919 to over 40 cents, prior to November, shews the anticipated shortage, and accounts for Jasperson's special efforts to get his share.

Deacon says that while buying he went to Jasperson each night at Kingsville, 8 miles off, and reported to him what he had bought, as Jasperson had requested him to do; that at one time Jasperson told him to "slow up" till he heard from him, and that he got word one or two days later that Jasperson wanted to see him, and he went to see him on a Monday, when the latter said, "Harry, I have just got word everything is all right, buy all you can." Copeland says that Jasperson instructed him on a Saturday to notify all the buyers to "slow up," and he told them not to buy on Monday till they heard from him, and later got instructions from Jasperson to go ahead. Quick, another of Jasperson's buyers, says that at the end of the first week he got instructions from Jasperson to quit buying till further instructed, and later got instructions from him to go ahead.

Deacon says he got instructions from Jasperson, about the 1st November, to stop buying, and that Jasperson asked him to bring a list of all the tobacco he had bought to enable him to check it up, and that he took this list to Jasperson on the 2nd November, a Sunday, when Jasperson said: "I did not tell you to buy Virginia tobacco. I told you to buy Burley tobacco;" but he said he would send Mr. Quick down and take it if it was worth the money, and Mr. Quick came down and agreed to take this Virginia tobacco for Mr. Jasperson. Deacon says that Jasperson did not take the same position about the Burley as about the Virginia, and later he had an interview with Jasperson about the Burley, when Jasperson told him

"they" (the MacDonald company) were putting up a large drying plant, and it would be late in the year before they were ready to receive Burley tobacco, and asked Deacon to put sellers off until the plant was equipped. He says the farmers kept pressing for delivery, and he kept putting them off, and saw Jasperson a few times, who still said he could not take the tobacco till the plant was ready. Jasperson admits that this plant was being erected and that he was not ready to take delivery till late in the year.

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From the 2nd November the price of tobacco kept gradually going down because the crop turned out much larger than expected, and there was an oversupply. Deacon says that the day before Christmas Jasperson told him for the first time that he had not authorised him to buy Burley tobacco, but he would probably take three cars early in January. Deacon then went to Montreal to see the MacDonald company, but the final result was this litigation.

Jasperson denies that he at any time instructed Deacon to buy any tobacco for him in 1919; denies that Deacon was at his house at all in the evenings of the buying season; and denies that any shortage of the tobacco crop in 1919 was anticipated.

[The learned Justice of Appeal made a synopsis of the evidence, and continued:]

The learned Chief Justice makes it a strong ground for believing Jasperson in preference to Deacon, that Deacon, on his own evidence, entered into an arrangement which stamps him as a dishonest servant, faithless and false to his employers and false and fraudulent to both employers and growers. So far as this is concerned, Jasperson is not in much better position than Deacon, because, after Deacon disclosed these transactions to him, he adopted and took over all the contracts for Warne tobacco on Dominion forms, without telling the Dominion company anything about it. He had both Deacon and Bailey make contracts for him or his principals in 1918 in their own names, which, so far as the vendors were concerned, were as much a deception on them as the contracts in question. In neither case would there be any fraud on the vendors, as the only effect would be to give them an additional right.

The real question is, in view of Deacon's former relationship with Jasperson, would his allegation of having made such an agreement, under the circumstances, be an indication, as the learned Judge thinks, that he would not hesitate to make false statements whenever he thought that his interests could be served that way. We must look at how the matter would appear at the time to Deacon, an inexperienced youth, till a few years previously

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in the employ of, and practically, as the learned Judge says, "bought up" by, Jasperson, in whom he had every confidence. If he made the agreement he says he did, he probably would not anticipate any evil consequences. His employers were first to get the full quantity of tobacco that they stipulated for, and Jasperson was to have the rest. He would not, probably, turn over in his mind all the consequences to the Dominion company and the growers in the event of Jasperson, on a slump in the market taking place, refusing to take the tobacco. If he had thought of such a possibility at all, he would probably have asked for written authority. No such ground as this for disbelieving Deacon seems to have occurred to any of the Judges in the former actions.

There are circumstances, in addition, that point to the truth of Deacon's evidence. Jasperson admits that he gave his buyers instructions to start buying at a certain price and "the raise." Deacon says he was so instructed by Jasperson, and he made his early contracts in this form, as Jasperson's other buyers did. Jasperson, on Saturday, told Quick to cease buying till further advised and on Monday evening telephoned him to resume. He told Copeland to have all his buyers slow up and told him again on Monday to have them go ahead. Jasperson says that he gave his buyers those instructions. Deacon says that Jasperson told him to quit, and two days later sent for him and told him to go on and buy all he could. The only explanation offered is that Deacon probably learned of Jasperson's instructions and acted accordingly. Deacon says that Jasperson, at the Foster factory in Leamington, towards the middle of September, asked Deacon to keep him in touch as to when the market would open for buying, as the large buyers were around Leamington, and he wished to be in touch because he wanted a large quantity of tobacco. Jasperson, on being examined as to this, says that he did not see Deacon himself about this, but may have told Quick, his agent, to do it, and that Quick told him he had done so. Is it likely that Jasperson would trust Deacon to keep him in touch, if he regarded Deacon purely as a competitor in the market? Business men do not trust to their opposition to help them along by keeping them informed.

[Further references to the evidence.]

The learned Chief Justice thinks Deacon's story is so improbable and stupid that some evidence in writing should be insisted on. I do not, however, see how it can be considered remarkable that there was no writing, in face of the admission by Jasperson that he employed Deacon the previous year to buy for him in Deacon's name and took and paid for tobacco so bought, and that there was nothing in writing between them.



The learned Judge also thinks it improbable that Jasperson would let Deacon buy for him or the MacDonald company in competition with his other buyers without letting them know about it. Again, this is exactly what he did in 1918, as the other buyers of that year testify.

The learned Judge concludes that Deacon was inspired with a desire to speculate and set out to buy for himself with that object, and "plunged." He made his first contracts, in conformity with the instructions Jasperson gave his buyers, at a certain price "and the raise." The tobacco which was being bought was in the field and would not be ready for delivery till about December, and this term in the contract meant that the vendors and not Deacon would get the benefit of any raise in price, so that speculation on these contracts was impossible. He bought throughout just as Jasperson's other buyers did, omitting this term when they did.

For the reasons I have indicated, the whole evidence and circumstances lead me to a clear conclusion that Jasperson did employ Deacon to go on buying tobacco for him over and beyond the amount he was authorised to buy for the Dominion company and assented to the use of the Dominion contract forms in the way Deacon used them. I am also of opinion that in telling Deacon it was not a matter of forms but of getting tobacco he left Deacon with a discretion to buy on any form, and that all the purchases made by Deacon in question in these two actions were made by Deacon in pursuance of Jasperson's instructions.

Jasperson testifies that all he did was as agent on behalf of the defendant W. C. MacDonald Regd. No evidence to the contrary is offered in these actions, as in the former actions, on behalf of W. C. MacDonald Regd. Jasperson had wide authority from this defendant, not only to purchase tobacco, but to establish an organisation for purchasing, including the appointment of his own agents to go amongst the farmers and make contracts of purchase.

In the previous actions, however, it was laid down by this Court, as a matter of law, that it was not within the scope of Jasperson's authority to make a contract with Deacon that involved a violation of his contract with the Dominion company. See the appeal-book, filed as an exhibit, pp. 548 to 567. Meredith, C.J.O., in those actions thought that subsequent adoption of the agency by the Dominion company cured this defect. It follows that the defendant W. C. MacDonald Regd. cannot be held liable under the Dominion contracts, and that Jasperson is liable on these to the vendor-plaintiffs in *Plumb v. MacDonald Regd.*

As to the Foster company contracts, no such difficulty arises, as

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 1926. therefore W. C. MacDonald Regd. is liable on all these contracts  
 to the vendor-plaintiffs in *Latimer v. Foster Tobacco Co. Ltd.*

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There should be judgment against Jasperson in *Plumb v. MacDonald Regd.* for the vendor-plaintiffs for the respective amounts owing to them, with a reference, if necessary, to ascertain the amounts, and with costs to the plaintiffs, and the action should be dismissed with costs as against MacDonald Regd. The judgment in *Latimer v. Foster Tobacco Co.* should be for the vendor-plaintiffs against the defendant W. C. MacDonald Regd. for the amount of their respective claims, with a reference, if necessary, to determine these amounts, and costs to the plaintiffs; and the action as against Jasperson should be dismissed with costs.

There should be a declaration that the plaintiff the Dominion company is entitled to be relieved by the defendant Jasperson against liability on the contracts in question.

MULOCK, C.J.O., and FERGUSON, J.A., agreed with SMITH, J.A.

MAGEE, J.A., agreed in the result.

HODGINS, J.A.:—I agree with my brother Smith that, as between the Dominion Tobacco Company and Jasperson, the principle of *res judicata* applies in the action of *Plumb v. MacDonald Regd.*, so that Deacon's general authority to buy tobacco for Jasperson, and Jasperson's improper inducement to Deacon to accept such authority and to act in breach of his duty to his employers, is not open to question here. Perhaps it is better stated by saying that, upon the facts shewn to have been proved in the former case and the judgment thereon, such determination is "conclusive between the same parties, upon the same matter, directly in question in another action:" *per* DeGrey, C.J., in *Duchess of Kingston's Case* (1776), 34 H.L. Jo. 655, 2 Sm. L.C., 12th ed., 754, at p. 755; *Strutt v. Bovingdon* (1803), 5 Esp. 56. In *Seddon v. Tutop* (1796), 6 T.R. 607, Grose, J., says (p. 609): "The only inquiry is whether the same cause of action has been litigated and considered in the former action."

Nor does it make any difference that the judgment against Jasperson was obtained under a third party notice claiming indemnity. The claim therein stated was in these words (in the Vamparys case): "The defendant the Dominion Tobacco Company claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by the

defendant Henry Deacon, in its name on your behalf and as your agent, and without any authority from this defendant."

Recovery upon that claim, as shewn in the judgments of the trial Judge, the Appellate Division, and the Judicial Committee, was based on the fact that Jasperson had made Deacon his agent to buy for him, and, in the circumstances proved, this was held to be a tort injuring the Dominion Tobacco Company and entitling it to be indemnified against the liabilities in which Deacon involved that company. This precise question is in litigation here, though in reference to distinct, though similar, contracts, growing out of the relationship so induced. I take it that where a judgment for indemnity has been pronounced between two parties on the ground that one was the principal and the other the agent, the judgment is conclusive: *Parker v. Lewis* (1873), L.R. 8 Ch. 1056, 1058.

In my view, Jasperson is estopped both on the fact of the relationship created and of its consequence, namely, the liability to indemnify Deacon, and I can find nothing proved in his case, such as compromise, release, etc., which, notwithstanding the estoppel, would relieve him. But in this case, and also with regard to the second case, *Latimer v. Foster Tobacco Co. Ltd.*, where no estoppel exists, the position is different as to the vendor-plaintiffs who desire a direct judgment against Jasperson and the MacDonald company. Where the crucial point arising in litigation and involving two parties to it is determined in an action, then when they are also parties, with others, to a second proceeding involving the same issue between them, and where new evidence is adduced, the Court has a difficult task to perform. It should proceed with a high degree of care and caution, where witnesses are produced who were in attendance at the former trial but who did not give evidence, especially if they are in business or other relations to the party now calling them, where a finding is asked on their testimony, contrary to the decision reached in the earlier case on the point. This is especially so in an appellate court which has itself examined and affirmed the view of the trial Judge in the former action. There is the likelihood—if not indeed the strong probability—that they are called to fill in gaps left at the former trial, and the danger exists that their evidence will be directed to bolster up any demonstrated weakness.

An appellate court has the right to review the findings of a trial Judge, and it is bound to examine fairly the additional evidence, and if it is evident that the judgment now in appeal is founded upon it or largely influenced by it, then the duty of the appellate court is to have regard to the views of the trial Judge while weigh-

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ing the fresh evidence bearing upon the Judge's finding. If it so happen that they have already considered the original evidence and pronounced a judgment upon it, which has been affirmed by a higher court, their duty is the same. But they are entitled to regard their own previous decision, and are, I think, bound to ascertain to what extent the judgment at bar is one which depends for the most part upon the trial Judge's observation of character and demeanour, or whether his conclusions necessarily involve inferences not wholly dependent upon that observation. While the learned Judge in this case expresses very clearly his estimation of the veracity of Deacon and Jasperson, he does not found his judgment upon that slender basis, but adduces his reasons for discrediting the one and believing the other. He says in part:—

“Fortunately, the case is not one which has to be determined on the conflicting testimony of two witnesses only.”

The additional evidence given was not newly discovered but was always available at the former trial.

On consulting the record of the present trial, it will be found that the additional evidence consists of the testimony of two new witnesses, Brown and Copeland, called for the defendants, and of some statements by four others, mentioned by the learned trial Judge, who had given evidence on the former trial as to various incidents. Their evidence, so far as it amplifies what they formerly said, as well as that of Brown and Copeland, is to my mind only evidence tending to corroborate Jasperson's contention, or perhaps to strengthen it. Indeed the additional evidence, standing by itself, is entirely made up of versions of conversations or of incidents which do not strike a new note or provide any secure standing ground apart from the previous evidence. The analysis made of it by my brother Smith indicates its inconclusiveness.

The remarks of a learned Lord Justice on a cognate question in *Young v. Kershaw* (1899), 81 L.T.R. 531, are suggestive, though not covering the whole ground of this case, because the entire evidence, old and new, is new in these cases so far as the vendor-plaintiffs are concerned, and therefore also as to the defendants. He says: “It is obviously in the public interests that parties, who have gone through the ordeal of litigation and have had their rights settled at the trial, should not afterwards be allowed to patch up the weak parts and fill up the omissions in their case by means of fresh evidence. That is a rule of great importance. . . . Then, again, as to the class of new evidence, the rule is that the new evidence must be such that, if adduced, it would be practically



conclusive—that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different.”

Acting upon the principles I have laid down, and upon the best consideration I can give to these cases, I would reverse the trial Judge and allow this appeal in the form suggested by my brother Smith.

As to *Latimer v. Foster Tobacco Co. Ltd.*, I do not agree with the learned trial Judge that Jasperson was not a party to the use of the Foster company's name, and had no knowledge of it. But Jasperson, having authorised Deacon—as I think it must be held—is responsible for the way in which Deacon exercised that authority; and, even if the exact way he did it was not specifically authorised, it was within the scope of his authority that he should conceal Jasperson's name and use that of others.

I would allow this appeal as to the MacDonald company.

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*Appeals allowed.*

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[APPELLATE DIVISION.]

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ROY V. GUARDIAN ASSURANCE CO.

March 23.

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ROY V. BRITISH CROWN ASSURANCE CO.

Jan. 25.

*Insurance (Fire)—Actions on Policies—Description of Buildings Insured—“Occupied as Residential Store”—Change in Occupation—Materiality—Statutory Condition 2 — Risk, whether Attaching — Buildings and User not as Described in Policy.*

The plaintiff's building, “occupied as residential store,” was insured against fire by a policy issued in January, 1919, and renewed from year to year, the last renewal being in January, 1923. The building was destroyed by fire in February, 1923. At that time a man and his family were living in the “residence,” but were temporarily absent; the store was not being operated, but was occupied by workmen who were repairing it for the purpose of the owner resuming business therein; and the fire was not contributed to by vacancy:—

*Held*, that the word “occupied,” used as part of the description of the building, should not be treated as involving anything beyond occupation at the date of the assumption of the risk; any reasonable occupation was sufficient; and it was not necessary that the “residence” and the store should both be occupied.

If the renewal, as stated in the receipt, carried with it the whole force and effect of the original policy, it was subject to statutory condition 2, and the onus was on the insurers to shew that any change



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occurring after the renewal was material to the risk. The risk attached, subject to the policy becoming void on the happening of any unnotified change material to the risk. The only change alleged was that the store was not being operated, and that was not, in view of the description in the policy, a change material to the risk.

The insurers were, therefore, liable upon that policy and upon another similar one on the same building, issued in January, 1923.

The plaintiff, in December, 1922, applied to another company for a policy upon other buildings, which were destroyed by the same fire.

The application was not in writing. A policy was issued on the 6th January, 1923. The buildings were described in the policy as "occupied by the assured as grain and flour and feed warehouses, stable, and private garage." No warehouse used in the way described was on the property, and the user of what was there was of a totally different kind from that stipulated for:—

*Held*, that the risk never attached, and the plaintiff could not recover.

### ACTIONS upon policies of fire insurance.

The three actions were tried together by RIDDELL, J., with a jury, at North Bay, and afterwards without a jury in Toronto.

*A. G. Slaght*, K.C., *Peter White*, K.C., and *W. F. McPhie*, for the plaintiff.

*R. S. Robertson*, K.C., and *W. S. West*, for the defendants.

March 23, 1925. RIDDELL, J.:—The plaintiff, Victor G. Roy, of the village of Earleton, Ontario, by a policy dated the 14th January, 1919, insured in the Sun Insurance Office for \$4,000 on "the two-storey frame building 23 x 78 and additions thereto attached . . . occupied as residential store situate on the north-east corner of lot No. 6 . . ."—this was renewed from year to year, the last renewal being on the 14th January, 1923. He also had a policy on the same property in the Guardian Assurance Company, dated the 5th January, 1923, for \$2,000; and another in the British Crown Assurance Company on a 2½-storey building across a lane, dated the 6th January, 1923, for \$3,000. A fire took place on the 27th February, 1923, totally destroying the buildings; the insurance companies declined to pay, and Roy sued.

The defence of arson was raised by all the companies, and that of fraud in the proofs of loss by the British Crown—there were other defences.

The cases came on for trial at North Bay, when, at the request of counsel for all parties, I relieved the jury from determining any of the issues except those of arson and fraud in the proofs of loss. The jury found in favour of the plaintiff on these issues, as I should have done had I been trying them. Then I granted an enlargement, permitting any amendments to be made not involv-

ing arson or any criminal offence, and allowing all parties to supplement the evidence as they might be advised.

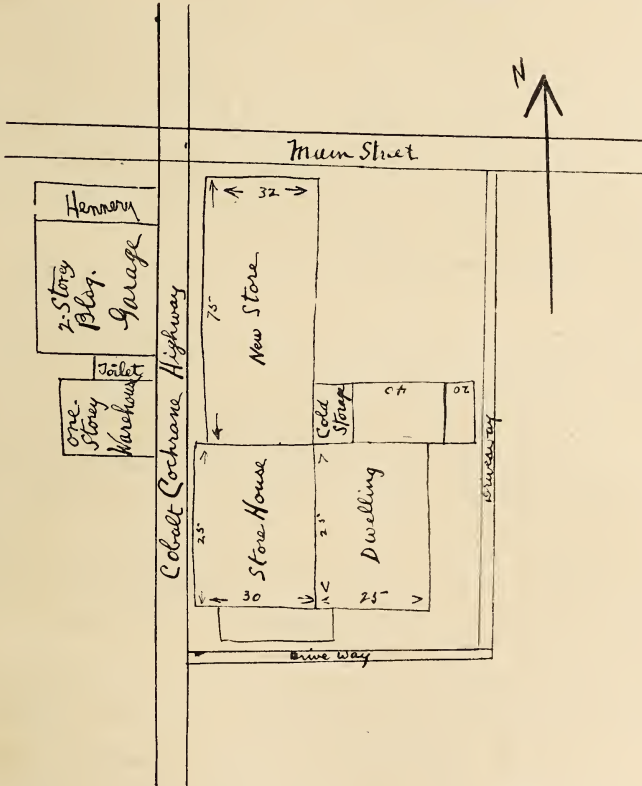
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The evidence now being completed and full argument heard, I proceed to dispose of the actions.

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The plaintiff owned some ten lots in Earlton, on which the burned buildings stood, having acquired the land in 1916.

Below is a rough plan of the premises at the time of the fire:—



The “storehouse” and “dwelling” are connected on the ground-floor with a door and passageway. These were on the ground when the plaintiff bought the property—the storehouse having been used for a store. He built the “new store” in 1916, and thereafter the “new store” was the part actually used as a “store” or “shop”—the “storehouse” as a storehouse. Between the “new store” and the “storehouse” there was a door also—but there was no communication between the “dwelling” and the “new store.” All the premises on the east side of the highway

Riddell, J. constituted the "residential store"—the actual dwelling being in  
1925. the "dwelling" and the upper storey of the "storehouse."  
Roy The insurance in the Sun and Guardian is on the buildings  
v. east of the Cobalt-Cochrane highway; that in the British Crown  
SUN on those west of the same road. Of the latter, there was only the  
INSURANCE one-storey warehouse at the time of purchase in 1916, and the  
OFFICE. plaintiff added the garage and hennery in the following two years,  
at an expense of \$4,675.

On the east side were the same buildings as at the time of the fire.

The plaintiff carried on business as a general merchant until 1921, when he leased to Poirier and Gagnon for 3 years from the 1st April, 1921, rent being \$55 per month. Poirier and Gagnon carried on business until 1922, when they "went into bankruptcy." Poirier's wife bought back the stock and removed to other premises in Earlton, between the 2nd and 6th January, 1923.

Poirier had in the meantime let to Boileau the "dwelling" and the upper storey of the "storehouse," five rooms to the east of the "storehouse," the original store—the tenant paid certain rent to Poirier, the January and February rent to Roy, and thereafter apparently to Byam, Poirier's trustee.

At the time of the fire, Boileau and his family were at Mrs. Boileau's mother's from the preceding Sunday afternoon, and he knows nothing about it. When Poirier went out, on the 6th January, 1923, the plaintiff allowed the "relief committee" to use his granary (which is marked "garage" in the plan) and warehouse for storing and distributing the goods furnished by the charitable for sufferers. No use was being made of the "new store" or the lower storey of the "storehouse."

When Poirier finally left, on the 6th January, the plaintiff went up, on the 8th January, from North Bay, found the condition of affairs, and returned. At some time he made up his mind to resume business—on the 22nd February, he bought 8 bags of sugar from a firm in North Bay, and went up himself on the 26th February, with two men, "carpenters," Sauvage and Dennis, who were to "clean up" and put the place in condition to resume business—he returned to North Bay the same day, leaving Sauvage and Dennis behind. They were instructed to "clean the shelves, clean the property and wash the floors . . . get lumber and build a woodshed . . . across the lane:" the plaintiff promising to return on the 1st March, when he intended to begin business again. He made an arrangement in North Bay for a car-load of flour and feed, provisions, sugar, a few groceries. Sauvage and Dennis

brought in a stove, bed, pillows, etc., and slept in the second storey of the "storehouse;" and about 10 or 10.30 of Tuesday the 27th February, when they were both asleep, the fire broke out and the buildings were consumed.

On the findings of the jury, with which I concur, the fire was accidental. (Sauvage and Dennis were unsatisfactory witnesses, but that is now immaterial).

Taking the policies separately (and omitting all disposed of by the jury), the Sun pleads (1) that the property was described as "occupied as a residential store," and at the time of the application it did not answer the description; (2) that, being so described, it was "not so occupied but was vacant" at the date of the issue of the policy, and the policy was therefore voided under the first statutory condition; (3) that there was a change material to the risk not notified by the plaintiff.

Objection 1 above is based upon the hypothesis that the time of the renewal of the 14th January, 1923, is the time of application for insurance. It is unnecessary to deal with this argument, and I pass over this point.

Objection 2 seeks to apply the *Baltic* case, *London Assurance Corporation v. Great Northern Transit Co.* (1899), 29 Can. S.C.R. 577, to the present terminology—there being no word like "while" or "whilst" in this policy, neither this nor *Ross v. Scottish Union and National Insurance Co.* (1917-18), 41 O.L.R. 108, 58 Can. S.C.R. 169, is directly applicable—but I do not decide one way or the other.

Objection 3 is fatal. The plaintiff knew on the 6th January, at the latest, that the property was no longer a "residential store;" he may have contemplated re-occupying it as a "residential store," but he did nothing in that direction for some 8 weeks, and he had not in fact re-occupied it as such at the time of the fire.

This was a change material to the risk, increasing the risk, on principle and authority, evidence and common sense.

I think the policy became ineffective under statutory condition No. 2.\*

\* R.S.O. 1914, ch. 183, sec. 194, condition 2: "Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the unearned portion, if any, of the premium which has been paid for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

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As to the Guardian Assurance Company, the defences are: (1) the same as (1) in the Sun defence, with the addition that there was a further restriction that the property "is and will be continually occupied during the currency of the policy for dwelling purposes above the ground-floor;" (2) that at the time of the issue of the policy the property was described as being "occupied as general store and dwelling," and that it "is and will be continuously so occupied during the currency of this policy for dwelling purposes above the ground-floor;" (3) the same as (3) in the Sun case.

I do not deal with the objections 1 and 2; but I think that this defence succeeds, for the same reason.

The British Crown Assurance Company pleads (all amendments being made): (1) that the property insured was represented to be "occupied by the assured as grain and flour and feed warehouses, stable, and private garage," and so insured; (2) that thereafter there was a change material to the risk; (3) overvaluation.

I think that the first objection is fatal to the claim under statutory condition 1.\*

In the above statement of facts I have stated them as favourably as possible for the plaintiff and have followed largely his own statement: in case there be need to consider the accuracy of any of them, or any other facts, I would say that from the conduct and demeanour of the witnesses the evidence of Patton is to be preferred. Other witnesses called for the defence are also to be accredited as against the plaintiff.

The actions will all be dismissed with costs, except the costs of the trial at North Bay, which will be to the plaintiff to be set off against the other costs.

The plaintiff appealed from the judgment of RIDDELL, J.

November 4, 1925. The appeals were heard by MULLOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

*Peter White*, K.C., and *W. F. McPhie*, for the appellant, argued that in the *Sun* case the evidence did not warrant a finding that there was a change in the nature of the property that was material

\* 1. If any person insures property, and causes the same to be described otherwise than as it really is to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

to the risk. They contended that the evidence of the insurance experts was not a sufficient basis for such a finding. Vacancy, *per se*, is not a change material to the risk. A temporary vacancy, caused by a change of tenants, does not render property anything other than "occupied," within the meaning of the policy. There was no misdescription of the property to the prejudice of the company. The renewal of a policy of insurance is not, in itself, a new contract. Even if the renewal did constitute a new contract and contained a misrepresentation, that misrepresentation was cured when the new tenants moved in, and the misrepresentation, if there was one, did not prejudice the company, because it was cured before the renewal receipt was given. In the *Guardian* case, counsel contended that no question of vacancy arose, and that there was no sufficient evidence to support a finding that there was a change material to the risk. In the *British Crown* case, they argued that there was no misdescription, and if there were a misdescription it did not prejudice the company. The onus was on the company to establish a misdescription prejudicial to the company. This onus was not satisfied. The company and its agent knew that the property was not occupied by the assured, as stated in the policy. The words "occupied by the assured" were not intended by the parties, at the time of the application, to appear in the policy. The application, even though oral, would govern, and not the policy. On the evidence, the occupation by the "relief committee" did not increase the risk. The property was never vacant, though part of it was temporarily unoccupied. Reference to *Boardman v. North Waterloo Insurance Co.* (1899), 31 O.R. 525; *Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co.* (1901), 3 O.L.R. 127; *Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co.* (1903), 33 Can. S.C.R. 94; *Anglo-American Fire Insurance Co. v. Hendry* (1913), 48 Can. S.C.R. 577; *W. Malcolm Mackay Co. v. British America Assurance Co.*, [1923] S.C.R. 335; *Shaw v. Robberds* (1837), 6 A. & E. 75, 82; *Davidson v. Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394, at p. 400; *Equitable Mutual Fire Insurance Co. v. De Saint Aubin* (1909), Q.R. 18 K.B. 345; *Morton v. Anglo-American Fire Insurance Co.* (1911), 2 O.W.N. 1470, 19 O.W.R. 870, (1912) 46 Can. S.C.R. 653; *Patterson v. Oxford Farmers Mutual Fire Insurance Co.* (1912), 4 O.W.N. 140, 23 O.W.R. 122; *Ross v. Scottish Union and National Insurance Co.*, 41 O.L.R. 108, 58 Can. S.C.R. 169.

*R. S. Robertson*, K.C., for the defendants, respondents, argued that, on the renewal of a policy of insurance, any change in the nature of the property must be made known by the assured. He

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App. Div. contended that in the *Sun* case the renewal was a new contract as  
 1925. of the 14th January, 1923. At that date the company agreed to  
 Roy insure only the property properly described in the policy. There  
 v. was a change material to the risk. Occupation of part of the resi-  
 SUN dence as a dwelling, with the remaining part vacant, is not occupa-  
 INSURANCE tion as a "residential store," as set out in the policy. *Agricultural*  
 OFFICE. *Savings and Loan Co. v. Liverpool and London and Globe Insur-*  
*ance Co., supra*, and *Ross v. Scottish Union and National Insur-*  
*ance Co., supra*, are distinguishable. In the *Guardian* case,  
 there was ample evidence to support a finding that there was a  
 change material to the risk. If the appellant is entitled to succeed  
 in the *British Crown* case, he is only so entitled to the extent of the  
 actual value of the buildings. Reference to *See v. London Guar-*  
*antee and Accident Co. (1924)*, 56 O.L.R. 78; *Corpus Juris*, vol.  
 26, sec. 109.

January 25, 1926. The judgment of the Court was read by  
 HODGINS, J.A.:—Appeals in three cases, tried together before  
 Riddell, J., who dismissed each action.

*Sun* case: The words "occupied as a residential store" were  
 in fact true when the original policy issued. When the risk  
 attached, as it admittedly did, to this building as then occupied,  
 there should be good reason shewn for treating the word "occu-  
 pied," used as part of the description, as involving something  
 beyond occupation at the date of the assumption of the risk. See  
*Ross v. Scottish Union and National Insurance Co.*, 58 Can. S.C.R.  
 169, at p. 179; and *Mahomed v. Anchor Fire and Marine Insurance*  
*Co. (1913)*, 48 Can. S.C.R. 546, at p. 554. To treat it otherwise  
 is to give it the effect and value of a continuing warranty, as in  
*Dawsons Ltd. v. Bonnin*, [1922] 2 A.C. 413, and not subject to  
 subsec. 5 (as amended in 1915 by 5 Geo. V. ch. 20, sec. 19) of sec.  
 156 of ch. 183, R.S.O. 1914, requiring its materiality to be expressly  
 stated. The company should not now be allowed to extend what it  
 neglected to define more closely at the inception of the contract.  
 The tendency now is to deal with warranties, even those which  
 imply the maintenance of present conditions, as conditions rather  
 than as limitations by description of the risk (*W. Malcolm Mackay*  
*Co. v. British America Assurance Co.*, [1923] S.C.R. 335;  
*Fidelity-Phoenix Fire Insurance Co. of New York v. McPherson*,  
 [1924] Can. S.C.R. 666), unless there are in the description  
 definite words of limitation as in the *Ross* case, *supra*.

In this respect the rule *contra proferentem* should be applied.  
 Statutory condition 2 is intended to, and does, I think, give every  
 reasonable protection to the insurer.



It is argued that the renewal is a new contract upon the terms of the old. The renewal of a fire insurance contract is not the same as the renewal of a life insurance contract, such as was the policy in the *Youlden* case, *infra*. The former cannot be renewed without the assent of the insurer: *Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co.*, 33 Can. S.C.R. 94, and *Long v. Ancient Order of United Workmen* (1898), 25 A.R. 147. If the renewal carries with it the full force and effect of the original policy, as the renewal receipt here states, then it is a renewal of the whole of that contract: *Youlden v. London Guarantee and Accident Co.* (1913), 28 O.L.R. 161. And it is therefore one subject to condition 2, so that the onus is on the company to shew that the change occurring after the renewal was material to the risk: *Morton v. Anglo-American Fire Insurance Co.*, 2 O.W.N. 1470, 19 O.W.R. 870; *Patterson v. Oxford Farmers Mutual Fire Insurance Co.*, 4 O.W.N. 140, 23 O.W.R. 122, *per* Mulock, C.J. Ex.D. As Boileau was residing there, though temporarily absent, as were his family, the only change that occurred was that the store was not being operated, though at the time of the fire it was in possession of men employed by the insured to fit it for use as a store, who in fact occupied it in so doing. The alterations and repairs seem to be of an ordinary character, such as the policy expressly permits. The learned trial Judge finds that the plaintiff has made up his mind to resume business and was intending to do so in the store on the 1st March. The evidence of those who spoke of materiality is confined to occupation as contrasted with vacancy, and their views on the abstract question are not to be taken as universally applicable, nor as decisive. See *Gould v. British America Assurance Co.* (1868), 27 U.C.R. 473. I do not understand that "occupation" is limited to personal occupancy by the insured. Any reasonable occupation of the building described as answering two purposes is enough, and it is not a necessary result of the language of the policy that the residence and store should both be "occupied." The only element suggested, apart from mere vacancy, was that if the store was not producing, i.e., being operated so as to produce, a revenue, it increased the moral risk in some way. This view does not commend itself to me, as it assumes that a store can never become idle or empty even temporarily, and that it must always be producing a revenue. That is not essential to the operation of a store; it may, indeed, be losing money. Occasional or temporary vacancy must have been in contemplation of both insurer and insured, and at the time of the fire both stores and dwelling were in fact in occupation, and vacancy was in no sense the cause of the fire which broke out in the dwelling. The

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facts do not warrant the conclusion that the risk was increased at the time of the fire by reason of non-operation; and, if so, that change was not one material to the risk. I think, therefore, that the judgment in appeal must be reversed and judgment entered for the plaintiffs for the face of the policy and interest.

*Guardian case:* In this case the policy was issued on the 5th January, 1923, and in it the words are "occupied as general store and dwelling." Boileau was then and at the time of the fire in occupation of the dwelling. Poirier did not complete his moving out until the next day. The fire did not occur until the 26th February, 1923. The conditions at the time of the fire were those set out in the *Sun* case, and the same result must follow.

*British Crown case:* This case differs from the others, and covers different buildings at Earlton, being on a warehouse, garage, and hennery. The policy is for \$3,000, and was verbally applied for in December, 1922, in North Bay, where one Patton was the agent. He countersigned it so as to give it validity on the 6th January, 1923.

The wording of the policy is "occupied by the assured as grain and flour and feed warehouses, stable, and private garage." The assured prepared a diagram at Patton's request, which was sent to the head-office, and stated, according to Patton, that he was occupying it himself for the storing of oats and hay. The occupancy was obviously not personal, as the plaintiff was then in business at North Bay, to Patton's knowledge, and no doubt both understood it to refer to the user of the buildings to be insured. This is plainly indicated by the fact that in writing to the head-office on the 29th December, 1922, Patton did not mention the assured as occupant, although he purports to report the description of the buildings which he says he received from the plaintiff. Why he subsequently inserted the words "by the assured" in the policy on the 6th January, 1923, is not explained. As the policy must conform to the application, it must in this case be read eliminating those words. The date of the company's assent to write the policy is nowhere given. As to user of the warehouse, Poirier says that it was in charge of a caretaker, Morin, who was there daily. The plaintiff says that the warehouse and granary (garage) were being used by Poirier's permission by the "relief committee" while Poirier was occupying the store opposite; and the plaintiff says he mentioned this to Patton. This is denied by Patton. The learned trial Judge prefers Patton's evidence to that of the plaintiff, and I think we are bound to accept his view. It is clear that no grain, flour or feed, was stored there when the policy was ap-

plied for, nor at any time, nor was it being used for warehousing them. There is no justification, to my mind, for rejecting the plain and unambiguous language of the policy as to what was being insured. No warehouse used in the way described was on the property, and the user of what was there was of a totally different kind from that stipulated for. The plaintiff cannot recover on this policy. The difference between this and the other cases at bar lies in the fact that here the risk never attached, while in the others it did, subject to the policy becoming void on the happening of any unnotified change material to the risk.

The result of the appeals should be that judgment should be entered for the plaintiff for \$4,000 and interest against the Sun Insurance office with costs of action and appeal, and for \$2,000 and interest with costs of action and appeal against the Guardian Assurance Company, and for the defendants the British Crown Assurance Company, dismissing the action with costs of action and appeal. As the cases were tried and argued on appeal together, the costs of trial and appeal should be apportioned one-third to each case.

*Two appeals allowed and one dismissed.*

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[GRANT, J.]

FRASER V. PAYNE AND CLEMENTS.

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Jan. 27.

*Costs—Action against two Defendants for Negligence—Reasonable Grounds for Suing both—Recovery against one only—Action Dismissed as against the other—Costs to be Paid by Plaintiff to Successful Defendant—Recovery against Unsuccessful Defendant.*

The plaintiff, a passenger, in a taxicab driven and owned by P., was injured in a collision between the taxicab and a motor car driven and owned by C. The plaintiff sued both P. and C. for negligence, and recovered against C., the action being dismissed as against P. with costs:—

*Held*, that, although C. did not in pleading seek to throw the blame of the collision upon P., it was reasonable to join both as defendants, and C. should pay not only the plaintiff's costs, but the costs which the plaintiff was ordered to pay to P.

*Bullock v. London General Omnibus Co.*, [1907] 1 K.B. 264, and *Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181, applied and followed.

ACTION for damages for injury sustained by the plaintiff in a collision between two motor vehicles upon a highway, the plaintiff alleging negligence of the defendants or one of them.

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January 11, 12, and 13. The action was tried by GRANT, J., and a jury, at Hamilton.  
*J. A. Soule*, for the plaintiff.  
*J. C. M. German* and *R. P. McBride*, for the defendant Payne.  
*C. V. Langs* and *H. Morwick*, for the defendant Clements.

January 27. GRANT, J.:—The action was brought by the plaintiff claiming damages against both defendants for injuries sustained by the plaintiff as the result of a collision between the automobiles owned by the respective defendants. The collision took place at the intersection of two streets in the city of Hamilton. The plaintiff was a passenger in a taxicab driven and owned by the defendant Payne; the defendant Clements was riding in his own car.

The usual series of questions was submitted to the jury, who by their answers negatived the charge of negligence as against the defendant Payne and found negligence against the defendant Clements. The negligence found was "that he was travelling at too high a rate of speed and not using precautions on approaching an intersection and not blowing his horn." The jury found that there was no contributory negligence on the part of the plaintiff and fixed the damages at \$5,000.

The question remaining to be determined is the disposition which should be made of the costs.

It has not been seriously contended that Payne, the successful defendant, should be deprived of costs, and I do not know of any reason which would justify such a course. The action, therefore, as against the defendant Payne will be dismissed with costs to be paid to him by the plaintiff.

The question still remaining to be solved is whether the plaintiff should or should not be allowed to collect from the defendant Clements the costs which the plaintiff is required to pay to the defendant Payne. Several cases have been cited to me, which I have read, and I have also read others which had not been referred to by counsel.

One of the English decisions most frequently cited upon this question is *Bullock v. London General Omnibus Co.*, [1907] 1 K.B. 264. That was an action of tort, the plaintiff claiming damages for injuries resulting from a collision between two vehicles; he brought an action against the respective owners alleging joint negligence and also claiming in the alternative. The jury found negligence on the part of one defendant and negatived negligence on the part of the other defendant. Judgment was



entered for the plaintiff against one defendant and judgment for the other defendant with costs in each case. The trial Judge further ordered that the costs payable by the plaintiff to the successful defendant should be included in the costs recoverable by the plaintiff from the unsuccessful defendant. The Court of Appeal held that the Court had jurisdiction to direct such a disposal of the costs.

A similar question arose in *Young v. World Newspaper Co.* (1920), 17 O.W.N. 432, and also in *Underhill Coal Co. v. Grand Trunk Railway Co.* (1919), 16 O.W.N. 354.

It is urged by counsel for the defendant Clements that, as his client did not by his pleadings seek to throw the blame for the collision upon the defendant Payne, therefore, he, Clements, ought not to be mulcted in the costs recovered by Payne in his successful defence of the action. As authority for the contention that such a ground justifies the refusal of costs, counsel for the defendant Clements cited the case of *Burrows v. Grand Trunk Railway Co.* (1915), 34 O.L.R. 142, at the bottom of p. 146. Reference is there made to the English decision of *Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181. In that decision of the Court of Appeal in England the general principle which should govern the disposition of costs, under circumstances such as those which exist in the case at bar, is enunciated by Vaughan Williams, L.J., on pp. 184 to 187 inclusive. At the bottom of p. 184 the learned Lord Justice refers to the contention which is now put forward by counsel for the defendant Clements, namely, that the unsuccessful defendant should only be made to pay the costs of the successful defendant if the former had sought by his pleadings or by prior correspondence with the plaintiff to throw the responsibility for the accident upon his co-defendant. His Lordship goes on to state that he does not think there is any such rule, nor does he believe that any such rule could be supported. At p. 185 he reiterates that statement.

His Lordship goes on to deal with the question, as he states, upon the basis of the judgment of the Court of Appeal in the case of *Bullock v. London General Omnibus Co.* (*supra*), but quotes extracts from the judgment, in the latter case, of Cozens-Hardy, L.J., stating at the same time that, in his opinion, the proper grounds are therein set forth. Then, at the lower part of p. 186 and the upper part of p. 187, the following language is used: "There had been a collision, and it took place under such circumstances that the injured person would, naturally, not have full information as to whose fault it was, but it took place under such circumstances that it might well have been the fault of one or

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other or of both of these people. Those being the circumstances of the case, it turns out after the trial that there is only one wrongdoer, but that wrongdoer was sued and successfully sued. Under these circumstances, was it a reasonable thing for the plaintiff, in his action against a man who ultimately turns out to be in fact the wrongdoer, to join the other defendant in order that the matter might be thoroughly threshed out? If, in the circumstances of the case, it was a reasonable thing to do, then he was entitled to add as part of the costs in bringing this reasonable action in which he reasonably joined this other person the costs of that other person who is found not to be at fault."

Then, at the bottom of p. 187, the following language is used, which is peculiarly appropriate in reference to the case at bar: "In this particular case we really have pretty ample evidence from both defendants that it was reasonable to join them because each blamed the other. I do not say that they gave notice of their blaming; but in fact each, when the trial came off, tried to put the blame on the other."

His Lordship goes on to state that under these circumstances he thinks the order disposing of the costs was a reasonable order.

The quotations above given appeal to me as both sensible and equitable, and in my view of the matter the principle enunciated is a proper one to be applied in cases of this nature.

There will, therefore, be judgment dismissing the action as against the defendant Payne with costs. The plaintiff shall have judgment against the defendant Clements for \$5,000, the amount of damages found by the jury, together with his costs of the action, including the costs which he is required to pay to the defendant Payne.

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[IN BANKRUPTCY.]

1926.

RE ELECTRICAL FITTINGS AND FOUNDRY CO. LTD.

Feb. 1.

*Bankruptcy—Claims of Creditors—Fund Arising from Sale of Debtor's Goods — No Seizure Made before Assignment — Priorities — Municipal Taxes and Rates—Ontario Assessment Act, sec. 109, subsec. 11 (12 & 13 Geo. V. ch. 78, sec. 24)—Claim of Bank to Proceeds of Goods Pledged to it under sec. 88 of the Bank Act—Constitutional Law—British North America Act, sec. 91(15)—Powers of Dominion Parliament—Interference with Civil Rights in Province.*

Where there is personal property of the bankrupt liable to seizure for taxes on his premises before or at the date of the authorised assignment, the rights of municipalities and public utility commissions in respect of claims for taxes and rates are governed by subsec.

11 of sec. 109 of the Ontario Assessment Act, as enacted in 1922 by 12 & 13 Geo. V. ch. 78, sec. 24; and under that section all that the municipalities or commissions are required to do, where such personal property (or cash received therefor) is in the possession of the trustee under the assignment, is to notify the trustee of the amount due, and the trustee shall thereupon pay the same "in preference and priority to any other and all other fees, charges, liens or claims whatsoever:"—

*Held*, that in construing subsec. 11 it must be assumed that the intention is to provide that taxes and rates shall be paid out of the property of the person liable therefor, and not out of the property of other persons: if the intention was to make liable all property on the premises, irrespective of its ownership, the provision would be *ultra vires* in so far as it deprived banks of their rights acquired under the Dominion Bank Act.

And, where the trustee had before him the claim upon the bankrupt's stock-in-trade of a bank secured under sec. 88 of the Bank Act, and the claims of two municipalities and a public utilities commission for rates and taxes under the provincial statute, it was *held* (1) that, no seizure having been made, there was no lien or charge in favour of the municipalities or the commission, at the date of the authorised assignment, on the stock-in-trade, for taxes or rates, because at and before that date the title to the property was in the bank; and (2) that, if a lien or charge did exist before the date of the assignment, it could attach only on the beneficial interest of the bankrupt, and was subject to the bank's lien under sec. 88.

The exclusive authority conferred on the Dominion Parliament by sec. 91 (15) of the British North America Act to legislate concerning the establishment of banks and the carrying on of banking business gave that Parliament the right to enact sec. 88 in order that a bank may be secured in lending the money entrusted to it; and a security taken under its provisions cannot be interfered with by provincial legislation.

So long as an enactment of the Dominion Parliament relates strictly to one of the subjects enumerated in sec. 91, it is of paramount authority, even though it trench upon the matters assigned to the provincial legislatures by sec. 92.

*Tennant v. Union Bank of Canada*, [1894] A.C. 31, followed.

The bank was, therefore, declared entitled to the moneys in the possession of the trustee resulting from the sale of the bankrupt's stock-in-trade, subject to certain prior claims for wages, trustee's compensation, disbursements, and costs.

MOTION by the trustee of the bankrupt estate of the above-named company for directions as to priority among claimants.

January 21. The motion was heard by FISHER, J.

W. B. McHenry, for the trustee.

A. J. Thomson, for the Standard Bank of Canada.

J. W. Graham, for the Municipal Corporation of the City of Toronto.

R. D. Moorhead, for the Municipal Corporation of the Town of Preston and the Preston Light and Water Commission.

Bull, for the Canadian National Railway Company.

J. A. Boles, for the Crown (Dominion Excise Department).

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February 1. FISHER, J.:—The question for determination on the trustee's motion for directions concerns the priority of certain creditors who have filed claims with the trustee. The trustee has in hand \$5,248.15. This sum was secured by the sale of certain assets of the insolvent company, under an arrangement entered into between counsel representing the different parties, that the trustee should sell these assets and hold them subject to the terms of a letter written by a firm of solicitors representing the Standard Bank, to the Trusts and Guarantee Company, dated the 24th October, 1924. It was admitted by counsel on the argument that this letter contains the correct terms upon which the sale was made. The debtor-company made an authorised assignment on the 20th September, 1924, and claims were filed with the trustee by the Hydro-Electric Power Commission (Toronto), City of Toronto for business tax, Town of Preston for taxes, Preston Light and Water Commission for rates due for light and water, the Workmen's Compensation Board, the Canadian National Railway Company, the Dominion Government for income tax for the year 1921 and also for business profit tax, the Department of Customs for excise sales tax, the Standard Bank of Canada, certain claimants for wages, claims by a Mrs. Bongard for rent and taxes, and a claim based on judgments recovered. All the parties were represented by counsel except the Hydro-Electric Power Commission, the Workmen's Compensation Board, the wage-earners, and the departments representing the income and business profit taxes.

I think it proper at this stage to dispose of certain of the claims filed. I am of opinion that the Government is not entitled to a preferential lien for the claims filed for income and business profit taxes, and Mr. Boles, counsel for the Government, abandoned any right to a lien for a claim under the War Revenue Act, 1915, and amendments.

I am also of opinion that the Canadian National Railway Company is not entitled to a preferential lien for rent. The claim is for the use of a railway siding, and the railway company does not appear to me to be in the position of a landlord.

Mrs. Bongard has failed to make out that she has any preferential lien for rent.

I do not determine who were the wage-earners, but hold that only those who earned wages within three months prior to the date of the authorised assignment are entitled to rank as preferred creditors.

Claims based on judgments obtained are not entitled to rank as claims of preferred creditors.



The remaining claims are confined to those of the municipalities, the claim of the Town of Preston for light and water, the claims of the Standard Bank and the Workmen's Compensation Board.

The rights of the bank are secured to it under the Bank Act, and the rights of the municipalities and the light and water commission are secured under provincial legislation. As the law now stands, under the provincial statutes all taxes and rates due to municipalities and public utility commissions are declared to be a lien on the lands of the taxpayer and are recoverable in the same manner—and there also is a right of distress on the personal property of the taxpayer. There was no seizure in this case, and there are no lands—the fund in question being merely the proceeds of personal estate. If there was personal property of the debtor liable to seizure for taxes on the debtor's premises before or at the date of the authorised assignment, the rights of any municipalities—including the public utility commission—are now governed by subsec. 11 of sec. 109 of the Assessment Act, as enacted by sec. 24 of the Assessment Amendment Act, 1922, 12 & 13 Geo. V. ch. 78. Under that section, all that the municipalities or the public utilities commissions are required to do, if personal property liable to seizure for taxes (or cash received therefor) is in the possession of an authorised trustee in bankruptcy, is to notify the trustee of the amount due for taxes and rates, and the trustee "shall pay the amount of the same to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever." It is admitted that the claims for taxes and rates were filed with the trustee in bankruptcy, within the meaning of this section.

The learned counsel for the bank contends that there was no personal property on the premises of the debtor liable to seizure for taxes before the date of the authorised assignment, and that the bank held an assignment of the whole stock-in-trade of the debtor under sec. 88 of the Bank Act, and that in any event the provincial legislature has no power to take away the priority rights given to a bank under the Bank Act. The trustee, therefore, has before him (1) the claim of the bank secured under sec. 88 of the Bank Act and (2) the claim of the municipalities and public utilities commission secured under provincial statutes; and the question for determination is, which statute is to govern?

In the construction of sec. 109 (11) (*supra*) of the provincial Act, I think it must be assumed that it is the intention of the Act to provide that taxes shall be paid out of the property of the person liable therefor, and not out of the property of other persons; and.

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even if the intention of the provincial legislature was to make all property on the premises of the taxed debtor liable for such taxes, irrespective of its ownership, I am of opinion that it had no power to do so in such a manner as to deprive banks of their rights acquired under the Dominion Bank Act; and, therefore, if the provincial Act were so construed, it would be *ultra vires*.

I am of opinion that the claim of the bank is entitled to be paid in priority to the claims for taxes and rates for two reasons: (1) No seizure having been made, there was no lien or charge in favour of the municipalities and commission, at the date of the authorised assignment, on the stock sold, for the taxes and rates now claimed, as, at and before that time, the title to the stock was in the bank. (2) If a lien or charge did as a fact exist in favour of the municipalities and commission at and before the authorised assignment, it could attach only on the beneficial interest of the debtor, and was subject to the prior assignment held by the bank under sec. 88.

The bank's claim to priority is based on the usual documents taken by a bank from its customers for present and future advances, and includes a general promise in writing to give security, a general agreement applicable to such securities, and a pledge under sec. 88 of the Bank Act, at the time each note was discounted at the bank for the debtor. All these securities for the past three years were put in as material on this motion.

The present Bank Act is the outcome of the exclusive right conferred by sec. 91 (15) of the British North America Act on the Parliament of Canada. The Bank Act applies to the whole Dominion, and contemplates amongst other things: (1) the issue of paper money negotiable throughout Canada; (2) the opening of banks and branches throughout Canada; (3) the receiving of deposits throughout Canada; and (4) the lending on securities of moneys deposited. It is therefore manifest that if the banks are not permitted to lend the moneys deposited with them by persons residing in all parts of the Dominion, on satisfactory securities, to those engaged in commercial enterprises, the very objects for which the banks were incorporated would be defeated, so that I think it must have been intended, when exclusive authority was conferred by sec. 91 on the Dominion Parliament to pass legislation pertaining to the establishment of banks and the carrying on of banking business, that the same Parliament should have the right to enact sec. 88 in order that a bank might be secured in making loans of the people's money deposited with it; and, therefore, any security taken under the provisions of the Bank Act cannot be interfered with or overruled by any provincial legislature.

In *Tennant v. Union Bank of Canada*, [1894] A.C. 31, it was held that sec. 91 of the British North America Act gave to Parliament power to legislate over every transaction within the legitimate business of the banks, notwithstanding that the exercise of such power interfered with property and civil rights in the Province, and that legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sec. 91, is of paramount authority, even though it trench upon the matters assigned to the provincial legislature by sec. 92: see *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Liquidators of the Maritime Bank v. The Queen* (1889), 17 Can. S.C.R. 657; and *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick* (1889), 20 Can. S.C.R. 695.

It was also held that the Parliament of Canada had the right to pass legislation pertaining to the subject of bankruptcy and insolvency, and in doing so had the right to override provincial legislation. See *Cushing v. Dupuy* (1880), 5 App. Cas. 409.

I, therefore, do not see how any taxes due to municipalities and a public utility commission can be paid out of the moneys resulting from a sale of a debtor's stock which was, at and before the time the taxes were due, assigned to the bank, and I must hold that the bank is entitled to the moneys in the possession of the trustee, subject to (a) the payment of the wage-earners' claims filed, but only for such wages as the claimants can prove were earned for a period of three months prior to the date of the authorised assignment, because these wages were always a first charge upon the goods secured to the bank under sec. 88; (b) the compensation of the trustee, confined exclusively to the conversion of the goods in question and not including the general costs of the administration of the estate; (c) to the disbursements referred to in the solicitors' letter (*supra*); and (d) to the trustee's costs of this motion, fixed at \$25

There should be no costs to any of the other contestants. The costs of the bank are of course to be added to its claim and paid out of the fund.

An order will therefore go pursuant to these findings.

Fisher, J.

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## [APPELLATE DIVISION.]

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REX V. SAM HING.

Feb. 8.

*Criminal Law—Having Opium in Possession—Opium and Narcotic Drug Act, 1923, 13 & 14 Geo. V. ch. 22, sec. 4, as Amended by 15 & 16 Geo. V. ch. 20, sec. 3—Summary Conviction by Police Magistrate—Right of Appeal—Criminal Code, sec. 1013 (13 & 14 Geo. V. ch. 41, sec. 9)—Right to Apply for Stated Case—Other Provisions of both Acts.*

The defendant was convicted by a police magistrate of the offence of having opium in his possession, without license or lawful authority, contrary to sec. 4 of the Dominion Opium and Narcotic Drug Act, 1923, as amended in 1925.

*Held*, that it was open to the magistrate, under the Criminal Code, to treat the offence either as an indictable offence or as a case proper to be disposed of under Part XV., relating to summary convictions; he had, as shewn by the proceedings, taken the latter course, and, the conviction being a summary one under Part XV., no appeal from it was given by sec. 1013 of the Code (as amended), and no appeal lay; but the right to apply for a stated case was not taken away.

Sections 21 and 24 of the Opium and Narcotic Drug Act, and secs. 749, 761, and 769 (2) of the Code, considered.

APPEAL by the defendant and motion by him for leave to appeal from his conviction and sentence by a police magistrate for the offence of having opium in his possession, without license or lawful authority, contrary to sec. 4 of the Dominion Opium and Narcotic Drug Act, 1923, 13 & 14 Geo. V. ch. 22, as amended in 1925 by 15 & 16 Geo. V. ch. 20, sec. 3.

Section 4 as amended provides, so far as relevant, as follows:—

“4. Every person who, . . . (d) has in his possession any drug save and except under a license from the Minister first had and obtained or other lawful authority; . . . shall be guilty of a criminal offence, and shall be liable (a) upon indictment, to imprisonment for any term not exceeding 7 years and not less than 6 months with or without hard labour, and to a fine not exceeding \$1,000 and costs and not less than \$200 and costs; or (b) upon summary conviction, to imprisonment for any term not exceeding 18 months and not less than 6 months, and to a fine not exceeding \$1,000 and costs and not less than \$200 and costs; provided that notwithstanding the provisions of section 1028 of the Criminal Code, or of any other statute or law, the Court shall have no power to impose less than the minimum penalties herein prescribed, and shall, in all cases of conviction, impose both fine and imprisonment. . . .”



January 25. The appeal came on for hearing before MULOCK, App. Div  
C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A. 1926

*C. A. Thompson*, for the appellant.

*F. P. Brennan*, for the Crown, took the preliminary objection that there was no right of appeal to this Court, the conviction being a summary conviction under Part XV. of the Criminal Code; and sec. 1013 of the Criminal Code, as amended in 1923 by 13 & 14 Geo. V. ch. 41, sec. 9, giving a right of appeal only to a person convicted on indictment. REF  
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February 8. The judgment of the Court was (by direction of the Chief Justice) read by MAGEE, J.A.:—Sam Hing appeals and asks leave to appeal to a Divisional Court from his conviction before Mr. Jones, Police Magistrate at Toronto, on a charge of having in his possession opium, without license or lawful authority, contrary to sec. 4 of the Opium and Narcotic Drug Act, 1923, as amended in 1925 by ch. 20.

The grounds stated in his notice of appeal are: that he was not guilty of that offence upon the evidence, but should have been convicted of smoking opium, with which he was also charged; and that he, being unrepresented by counsel, should not have been allowed to give evidence on his own behalf without first being cautioned that anything he might say might be used against him; and such other grounds as may be deemed expedient or the Court may allow.

It is objected that no appeal lies to this Court, as it was a summary conviction, and was not a conviction upon a summary trial for an indictable offence.

Under sec. 4 of the Act referred to, any one guilty of the offence is liable upon indictment to imprisonment, with or without hard labour, for 7 years and a fine of \$1,000, or upon summary conviction to imprisonment for 18 months with a fine of \$1,000, and in either case both fine and imprisonment must be imposed and the minimum is to be 6 months' imprisonment and a \$200 fine.

In this case the minimum punishment was awarded.

Under the Criminal Code it was open to the Police Magistrate to treat the offence as an indictable offence, and, if the accused elected to be tried before him, proceed with the trial under Part XVI. of the Criminal Code, relating to the summary trial of indictable offences, or he might deal with it as a case proper to be disposed of without consent of or election by the accused, under Part XV., relating to summary convictions.

The learned Police Magistrate seems to have taken the latter



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course. The accused was not told that he had a right to be tried by a jury, and was not asked whether he wished to be tried by a jury or by the magistrate, which would be necessary if the case were to be treated as one of an indictable offence. The conviction is in the form given for summary convictions and not in the form for convictions on summary trial.

On a summary conviction ordinarily there would be a right of appeal to the Court of Quarter Sessions under sec. 749 of the Criminal Code, or there would be a right to apply to have a case stated for the opinion of a superior court under sec. 761. By sec. 21 of the Opium and Narcotic Drug Act, 1923, no conviction under the Act shall be removable by certiorari; and, by sec. 24, the provisions in the Criminal Code (secs. 749 to 760) are not to apply to offences such as this, under sec. 4, unless when tried before two justices of the peace. Thus the right of appeal to the General Sessions is taken away, and this would, by sec. 769(2) of the Criminal Code, also take away the right under sec. 761 to apply to have a case stated; but, by sec. 24, already mentioned, sec. 769(2) is not to apply to offences such as this under sec. 4 of the Opium and Narcotic Drug Act.

Therefore, the right upon a summary conviction to apply for a stated case was not taken away.

But the question here is, has this Court jurisdiction? A right of appeal to this Court is given by sec. 1013 of the Criminal Code, as amended in 1923 (by 13 & 14 Geo. V. ch. 41, sec. 9) to "a person convicted on indictment." This appellant has certainly not been convicted on indictment, nor upon trial as of an indictable offence, and hence is not given the right of appeal, and the appeal must be dismissed and the application for leave refused.

As regards the facts of the case, there was direct evidence that opium was found in the appellant's possession, apart from any admissions made by him in his evidence given on his own behalf.

*Appeal dismissed and motion refused.*

## [APPELLATE DIVISION.]

## REX V. BUNTING.

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Feb. 8.

*Criminal Law—Refusal or Neglect to Provide Necessaries for Wife and Child—Criminal Code, sec. 242A—"Lawful Excuse"—Inability.*

Genuine inability of a husband and father to provide necessaries for his wife and child is a "lawful excuse," within the meaning of sec. 242A of the Criminal Code (as enacted by 3 & 4 Geo. V. ch. 13, sec. 14), for refusing or neglecting to do so.

APPEAL by the defendant from his conviction by one of the Police Magistrates for the City of Toronto of the offence of refusing or neglecting to provide necessaries for his wife and child.

January 14. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

A. G. Slaght, K.C., for the appellant, contended that, on the evidence, the appellant was genuinely unable to pay anything to his wife, and that was a lawful excuse within the meaning of sec. 242A of the Criminal Code, as enacted by (1913) 3 & 4 Geo. V. ch. 13, sec. 14.

F. P. Brennan, for the Crown, contended that inability to provide necessaries was not shewn.

February 8. The judgment of the Court was read by MULOCK, C.J.O.:—The accused was convicted under sec. 242A of the Criminal Code of the offence of refusing or neglecting, in the month of July, 1925, to provide necessaries for his wife and child.

The section reads as follows:—

"Everyone is guilty of an offence and liable on summary conviction to a fine of \$500, or to one year's imprisonment, or to both, who—

"(a) as a husband or head of a family, is under a legal duty to provide necessaries for his wife or any child under sixteen years of age; or,

"(b) as a parent or guardian, is under a legal duty to provide necessaries for any child under sixteen years of age;

"(c) and who, if such wife or child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessaries."

The accused and the prosecutrix were married on the 5th December, 1922, and there has been issue of the marriage, one child, now living with her mother.

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The trial was held on the 27th August, 1925, and on conviction the accused was sentenced to imprisonment in the Ontario Reformatory for three months and an indeterminate period thereafter, not to exceed twelve months less one day. The appeal is from his conviction.

Owing to the unsatisfactory manner in which the examination of witnesses was conducted, it is difficult to discover what the evidence establishes, but I think it is to the following effect:—

After the marriage, the accused and his wife lived together as man and wife in Toronto, the accused being in the service of the Bell Telephone Company, and in receipt of wages amounting to \$26.40 a week. The rental of the house which they occupied amounted to \$50 a month.

On or prior to the 10th December, 1924, the wife left her husband, and with the child took up her residence with her father and mother, where they have ever since lived and been provided for, except when the wife occasionally earned comparatively small sums of money. The reason assigned by her for leaving him was that he did not give her “enough money,” “just merely to provide eatables for the house.”

On or about the 10th December, 1924, the husband left the employment of the Bell Telephone Company, proceeding to the north country with a young woman, and he has since resided there.

The Bell Telephone Company offered to take him back into their service if he would return and live with his wife, but this he refused to do.

On her examination she was asked: “Q. I understand that there is an order to pay you something?” To which she answered: “Yes. Order to pay me \$10 a week. Q. Outside of that, has he supported you in any way at all? A. No.”

The husband swore that when living with his wife he gave her all his earnings; that since he had left for the north he had earned \$18 a week except when out of work, and “I gave her money every time it was due from the time we left until the 26th of June” (meaning 1925), and that on that day he sent her \$20. He admitted that he had not sent her money for the month of July, and swore that the reason was that he had lost his job and was unable to get another, and had no money.

No attempt was made to challenge the correctness of the reason assigned by the accused for not providing necessities in July, and the question is whether genuine inability to do so constitutes lawful excuse within the meaning of sec. 242A.

Even if in the previous December the accused by his own fault lost his position with the Bell Telephone Company, we have to determine the question of fact whether he was able in July to provide necessaries for his wife and child? The evidence shews that he was then without money or employment and practically penniless and therefore unable to provide necessaries. Parliament did not, I think, intend the section to be construed as meaning that if a husband did not perform the impossible, nevertheless he was to be deemed guilty of a criminal offence.

I am of opinion that the inability of the accused to provide necessaries constituted a lawful excuse for his not having done so, and the conviction should be set aside.

*Appeal allowed.*

[APPELLATE DIVISION.]

PINSONNEAULT V. LESPERANCE.

*Vendor and Purchaser—Agreement for Sale of Land—Memorandum in Writing—Construction of—Money to be Paid on Execution of “Contract”—Whether Execution a Condition of Bargain—Executory Contract—Sale by Vendor to Another at Advance in Price—Breach of Contract—Damages—Compensation for Loss of Bargain—Return of Sale-deposit.*

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The defendant signed a document, written in French, of which the following is a translation: “I acknowledge having received \$100 on account of my house No. 812 Assumption, which I sell to” (naming the plaintiff) “for the price of \$5,000 on the following conditions—\$900 on execution of contract; \$500 or more a year on principal with interest at 7%.” A few days after signing this, the defendant sold the property mentioned in it to another person for \$5,500. The plaintiff brought this action to recover damages for breach of the contract evidenced by the document:—

*Held* (MULOCK, C.J.O., dissenting), that the “contract” referred to in the document was one which should put in more formal language the agreement of the parties, but the execution of a further document was not intended to be a condition or term of the bargain; and a binding agreement was made when the document above set out was signed.

Dictum in *VenHatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284, at p. 259, approved.

*Per* MULOCK, C.J.O.:—The meaning of the document signed by the defendant was, that the plaintiff should execute a contract to purchase and at the time of execution pay \$900 on account of the purchase-money, and should thereafter pay the balance in annual sums with interest, and that until final payment the contract should remain executory.

*Held*, also, by the majority of the Court, that, as the defendant had in bad faith and for his own advantage broken his agreement, the



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LESPERANCE. plaintiff's damages should not be confined to his expenses for searching the title, etc.; he was entitled to compensation for the loss of his bargain; and the compensation was assessed at \$500, the advance in price actually secured by the defendant.  
*Bain v. Fothergill* (1874), L.R. 7 H.L. 158, distinguished.  
*Engell v. Fitch* (1869), L.R. 4 Q.B. 659, and *Clergue v. McKay* (1903), 6 O.L.R. 51, applied and followed.  
*Per Curiam*.—The plaintiff was entitled to the return of his \$100 deposit.

ACTION for damages for breach of a contract.

The action was tried by WRIGHT, J., without a jury, at Sandwich.

*W. D. Roach*, for the plaintiff.

*H. L. Barnes*, for the defendant.

June 27, 1925. WRIGHT, J.:—In this action the plaintiff sues the defendant for \$1,000 damages for breach of contract in connection with a sale of lands in the city of Windsor. The contract was in the French language and a translation of the same is as follows:—

“Alfred Lesperance. I acknowledge having received one hundred dollars (\$100.00) on account of my house No. 812 Assumption, which I sell to L. P. Pinsonneault for the price of five thousand dollars (\$5,000.00) on the following condition—\$900 on execution of contract; \$500 or more a year on principal with interest at 7%. (Signed) Alfred Lesperance. Windsor, May 14th, 1924.”

This document was signed on the 14th May, 1924, and a few days afterwards the defendant sold the property to his nephew for \$5,500. The property was owned by the defendant and his wife, Virginia Lesperance, as joint tenants. It is admitted that the latter was present at the signing of the agreement and had full knowledge of the sale.

Counsel for the defendant contends that the document in question is not a binding agreement, inasmuch as it contemplates the execution of a more formal document embodying the terms of the sale.

The decisions are uniform in establishing the principle that if it was a condition or term of the bargain that there should be a further contract executed, then the plaintiff's action would fail, because there was no concluded agreement. It is necessary therefore to decide whether this document is merely a preliminary agreement or whether it is a binding and concluded agreement.

The dictum of Parker, J., in *Von Hatzfeldt-Wildenburg v.*

*Alexander*, [1912] 1 Ch. 284, states concisely the rule to be applied in cases like the present, in the following words (p. 289):—

“It is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract.”

This statement of the law has been approved of in *Chillingworth v. Esche*, [1924] 1 Ch. 97, and in *Coope v. Ridout*, [1921] 1 Ch. 291, and other cases. It is to be noted that in most, if not in all, of the decided cases the written documents contain terms or expressions to the effect that the contract is subject to certain conditions.

In the present case there is no such term, and I think the document itself contains all the essentials necessary for a concluded agreement, and that the contract referred to was intended merely to put in more formal language the agreement between the parties. I do not think that the execution of a further document was intended to be a condition or term of the bargain, and I therefore hold that the contract in question was binding upon the defendant.

Another question now arises as to the proper measure of damages in a case like the present. Counsel for the defendant relies upon the judgment in *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, as deciding that in any action brought by a purchaser to recover damages for breach of contract for the sale of land the purchaser is restricted to his expenses for searching title, etc. In that case the vendor was unable to make a good title, and the rule as to the proper measure of damages in such cases was formulated. In the present case it was solely because of an increased price being offered to the vendor that he refused to carry out the contract, so that it was entirely his own fault.

Upon this state of facts I think that the decision in *Engell v. Fitch* (1869), L.R. 4 Q.B. 659, is applicable. That case has been referred to with approval in *Day v. Singleton*, [1899] 2 Ch. 320. See also *Jones v. Gardiner*, [1902] 1 Ch. 191; also *Clergue v. McKay* (1903), 6 O.L.R. 51, where the late Mr. Justice Osler distinguishes the decision in *Bain v. Fothergill* from a case where the sale is not carried out through default on the part of the vendor and where he has in bad faith and for his own advantage broken his agreement.

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I think therefore that the plaintiff is entitled to recover damages by way of compensation for the loss of his bargain. As the defendant, within a few days after the contract with the plaintiff, sold the lands for \$5,500, or at an advance of \$500, I think that sum may well be taken as the proper amount to be allowed the plaintiff for damages for breach of contract.

There will therefore be judgment for the plaintiff for the return of the cheque for \$100, being the deposit, and for \$500 damages, with costs on the Supreme Court scale.

The defendant appealed from the judgment of WRIGHT, J.

November 13, 1925. The appeal was heard by MULOCK, C.J.O., MAGEE, FERGUSON, and SMITH, J.J.A.

*Barnes*, for the appellant, contended that, upon the true construction of the agreement, the parties were never *ad idem*, and that the agreement contemplated the execution of a further formal document embodying the terms of the sale. No such document was ever executed, and there was therefore no contract. The trial Judge erred in assessing the damages. At most, the plaintiff was only entitled to recover his deposit, with interest and costs. Reference to *Bain v. Fothergill*, L.R. 7 H.L. 158.

*J. P. Walsh*, for the plaintiff, respondent, contended that there was no ambiguity in the agreement. The parties intended, by the expression "on execution of contract," only the execution of the formal deed or transfer. The respondent was never in default, and the appellant attempted to repudiate the contract before the time appointed for execution or delivery of the deed. The appellant had established the measure of damages by his own evidence. The findings of fact of the trial Judge were correct.

February 8, 1926. FERGUSON, J.A.:—I would dismiss this appeal for the reasons stated by Mr. Justice Wright when delivering judgment after the trial, with which reasons I fully concur.

MAGEE and SMITH, J.J.A., agreed with FERGUSON, J.A.,

MULOCK, C.J.O.:—This was an action for damages for breach of a contract for the sale of lands. Both parties reside in the city of Windsor. The defendant and his wife were the owners of the lands in question, and on the 14th May, 1924, the defendant, with his wife's approval, signed and delivered to the plaintiff a

certain paper writing in French, a translation of which reads as follows:—

“Alfred Lesperance. I acknowledge having received one hundred dollars (\$100.00) on account of my house No. 812 Assumption, which I sell to L. P. Pinsonneault for the price of five thousand dollars (\$5,000.00) on the following condition—\$900 on execution of contract; \$500 or more a year on principal with interest at 7%. (Signed) Alfred Lesperance. Windsor, May 14th, 1924.”

The defendant's contention was that this document did not constitute a binding agreement, but was conditional on the payment of \$900, and on a formal agreement being entered into. The learned trial Judge, quoting with approval the rule of construction laid down by Parker, J., in *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284, and approved of in later cases, held that the document was a concluded agreement, and, therefore, binding upon the defendant. At the trial both parties agreed on Gasper Pacaud as interpreter, and the English version of the document above set forth is his translation of the original French version. In the French version after the figures “\$900” were the words “*en passant le contract*,” the translation of which Mr. Pacaud first gave as “on passing the contract or execution thereof,” but when asked what was meant by “on passing the contract” he said, “the execution of the contract,” and he added, “The deed is passed in French by the execution.” There was no evidence that Mr. Pacaud was qualified to give evidence as to French law, and I, therefore, disregard the added statement.

Discussing the question of a conditional offer, Lord Sterndale in *Rossdale v. Denny*, [1921], 1 Ch. 57, says (pp. 66, 67):—

“I am far from saying that there may not be an unconditional offer and acceptance of a binding contract, although the letters may contain the words ‘subject to a formal contract,’ but certainly these words do point in the direction of the offer or acceptance being conditional. I do not think it can be put higher than that; I think he is well founded in saying that the general trend of the decisions has been, where those words occur, to hold that the offer or acceptance was conditional.”

Referring to these observations of Lord Sterndale, Warrington, L.J., in *Chillingworth v. Esche*, [1924] 1 Ch. at p. 111, says:—

“But it seems to me that too much importance has been attributed to these expressions of Lord Sterndale, and I think what he meant to say was that the words in question indicate in them-

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selves no binding bargain, and are merely conditional, but that there might be other circumstances which would induce the Court not to give them that meaning in a particular case."

In the present case the defendant agrees to sell "on the following condition—\$900 on execution of the contract; \$500 more a year," etc.; and the question is whether the condition referred to means that the vendor's offer is conditional on the payment of \$900, and the execution of a contract, or merely sets forth the terms of payment.

With all respect to the view reached by the able and careful trial Judge, I find myself unable to share in his construction of the document. In my opinion, it means that the plaintiff shall execute a contract to purchase and at the same time pay \$900 on account of the purchase-money, and shall thereafter pay the balance of the purchase-money in annual sums of not less than \$500 with interest, and that until final payment the transaction shall remain executory.

Thus, the order of events so set forth in the defendant's offer is, first, payment of the \$900 and execution of a contract to purchase, and, next, payment of the balance of the purchase-money during a period which may extend to eight years.

This construction, if correct, negatives the suggestion of the plaintiff's counsel that the required contract means the conveyance to which the purchaser would ultimately be entitled. Such contract and conveyance are entirely different instruments—the former is to precede whilst the latter would follow the making of the annual payments.

The plaintiff's counsel also suggested that upon payment of the \$900 the vendor might make a conveyance to the plaintiff and receive back from him a mortgage to secure the unpaid purchase-money and interest, and that the contract in question might have reference to such conveyance. Such a possibility cannot affect the meaning of this document, in construing which we must be guided by its language, which leaves the transaction executory until completion of payment of the purchase-money and interest.

For these reasons, I am of opinion that there must be deducted from the sum of \$600 damages awarded to the plaintiff the amount allowed him for breach of contract, viz., \$500. The remaining sum of \$100 is in respect of the \$100 deposit which was paid by the plaintiff in anticipation of a binding agreement being entered into between the parties, and the fair inference is that it was the intention of the parties that if such agreement was not reached the money would be returned: *Palmer v. Temple* (1839), 9 A. &

E. 508; *Chillingworth v. Esche*, [1924] 1 Ch. at p. 112. Under these circumstances it had the character of money received by the defendant for the use of the plaintiff: *Blackburn v. Smith* (1848), 2 Ex. 783. Therefore the plaintiff, subject to the defendant's right of set-off, is entitled to maintain his judgment to the extent of \$100, the amount of the deposit. This sum was recoverable in the Division Court, and the plaintiff is entitled, throughout, to costs on the Division Court scale only. The defendant is entitled to be paid the amount by which his costs throughout, taxed on the Supreme Court scale exceed the plaintiff's costs, the same to be set off against the plaintiff's damages and costs, and if they exceed the same then the plaintiff to pay the defendant the excess.

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*Appeal dismissed with costs (MULOCK, C.J.O., dissenting).*

[ROSE, J.]

TRADERS TRUST CO. V. CRAWFORD.

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Feb. 8.

*Ontario Temperance Act—Company Incorporated under Dominion Companies Act with Power to Export Intoxicating Liquors—Illegal Sale to Person in Ontario—Secs. 40 and 49 of Act—Chattel Mortgage Given to Secure Payment of Price—Action by Assignee of Mortgage upon Covenant for Payment—Notice of Illegality—Sec. 57 of Act—Subsequent Assignee for Value without Notice.*

The defendant in February, 1923, bought 40 cases of whisky from a company incorporated under the Dominion Companies Act, with power to export fermented spirits and malt liquors. The sale was made at the company's warehouse in Ontario, the defendant being a resident of the Province who had been engaged in the business of selling intoxicating liquor contrary to the provisions of the Ontario Temperance Act. As security for payment of the price, the defendant made a chattel mortgage on some cattle in favour of S., who was in charge of the warehouse. The whisky was removed to the defendant's farm in Ontario. The vendors knew that the whisky was to go there and was to be sold in contravention of the Act. The mortgage was assigned by S. to F., who was also interested in the company, two days after the time named for payment, a month after the sale. About this time, the defendant was asked to pay and refused to do so. After the lapse of nearly two years, during which no attempt was made to enforce payment, F. assigned the mortgage to the plaintiffs, and they brought this action upon the covenant for payment therein contained:—

*Held*, that, even if the plaintiffs were subsequent purchasers or assignees for value, the evidence did not shew that they had no notice of the purpose for which the mortgage was given, and they did not come within the saving clause of sec. 57 of the Ontario Temperance Act—"subsequent purchasers or assignees for value without notice."

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*Held*, also, that (the transaction being prohibited by secs. 40 and 49 of the Act) S. could not have succeeded in an action upon the aforesaid covenant, whether he sued on behalf of the company or on his own behalf; and an assignee of the mortgage was in no better position than S.—sec. 57 does not create a right of action where none existed before.

The true meaning and effect of sec. 57 considered.

AN action upon the covenant for payment contained in a chattel mortgage.

The action was tried by ROSE, J., without a jury, at Fort Frances.

*A. D. George*, for the plaintiffs.

*C. R. Fitch*, for the defendant.

February 8. ROSE, J.:—In 1921, on the petition of H. J. Ross, R. M. Frankfurter, and others, residing in Winnipeg, a company called United Shippers Limited was incorporated under the Dominion Companies Act, with power, amongst other things, to export all kinds of fermented spirits and malt liquors. In February, 1923, Carl F. Schimnowski was in charge of this company's export warehouse at Rainy River, Ontario. On the 19th February, at night, the defendant, who had been engaged in the business of selling liquor contrary to the provisions of the Ontario Temperance Act, came to Rainy River from his farm in the township of Carpenter, in Ontario, and, after conversations first with Ross and later with Ross and Schimnowski, agreed to buy 40 cases of whisky for \$1,600, and, as security for payment of the price within one month, to give a chattel mortgage on some thoroughbred cattle represented as being on his farm. A man was engaged to take the whisky in his waggon to the defendant's farm (or to some nearer place where he could transfer it to a waggon coming to meet him); the waggon was taken into a shed where the whisky was stored; the doors of the shed were barred and the cases were put in the waggon. Either before or immediately after the waggon had gone, a solicitor was visited at a hotel where he lived, and the mortgage was drawn up and executed. In the mortgage the defendant was described as of the township of Carpenter, farmer, and the cattle were said to be on lot No. 12 in the township of Carpenter. (In the mortgage there is a certain lack of legibility which led counsel at the trial to think that the cattle were said to be on lots 11 and 12, whereas the defendant had no interest in lot 11). Schimnowski was named as the mortgagee.

There is a suggestion by Schimnowski, whose evidence was taken on commission, that he believed the defendant to be resident in the United States, and that the sale was one of those sales to "persons in foreign countries" which, by sec. 46 of the Ontario Temperance Act as amended by (1921) 11 Geo. V. ch. 73, sec. 3, are declared not to be within the provisions of the Act; but I think that the defendant's account of the transaction is substantially true, and I have no doubt that the vendors knew that the whisky was to go to the defendant's farm in Ontario and was to be sold by the defendant contrary to the provisions of the Act. It may have been believed, as the fact was, that some of the defendant's customers lived in the United States and that some of the whisky would find its way across the border; but it is perfectly absurd to ask a court to find that the transaction was a lawful sale for export.

Schimnowski says that in making the sale and taking the chattel mortgage he was acting for the United Shippers, and it may be assumed that that much of his evidence is true, although for some reason he assigned the mortgage to Frankfurter on the 21st March, 1923, two days after the time named for payment. Just before or just after this assignment, Schimnowski went to the defendant at his farm to demand payment, and the defendant refused to pay, because, as he says, some of the bottles were broken or empty and the contents of the others were of such inferior quality that persons to whom he had made sales had demanded the return of their money. After this for nearly two years no attempt seems to have been made to enforce payment. On the 5th January, 1925, Frankfurter assigned the mortgage to the plaintiffs, whose head-office is in Winnipeg, and the plaintiffs demanded payment. The defendant refused to pay the full amount, although apparently he was willing to pay something, for the purpose, as he says, of avoiding publicity. At this time the defendant had no cattle answering the description contained in the mortgage—indeed, he says that he never had any cattle bearing the marks mentioned in the mortgage and that he cannot account for such a description being used—and, there being nothing to seize, this action was brought on the covenant for payment.

The plaintiffs made the attempt that has been mentioned to prove by Schimnowski's evidence that the transaction between the United Shippers (or Ross and Schimnowski) and the defendant was lawful and valid. They contend moreover that, whatever might have been the case if the United Shippers had been suing, they, the plaintiffs, are "subsequent purchasers or assignees for

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value without notice" within the meaning of sec. 57 of the Ontario Temperance Act, and as such are entitled to enforce the covenant for payment.

On the 23rd March, 1923, the plaintiffs issued their cheque for \$2,500 to a firm of solicitors practising in Winnipeg, who are said to have been acting for Frankfurter; and the plaintiffs' estate-manager says that this cheque was for the amount of an advance made to Frankfurter on the security of a motor car and the defendant's mortgage, the advance, or a portion of it, being required by Frankfurter for the purpose of paying a fine that had been imposed upon the United Shippers. Why the mortgage was not assigned by Frankfurter for nearly two years after the making of the advance was not stated; but the difference between the dates of the cheque and the mortgage was not referred to at the trial, and perhaps it would be unsafe to draw any unfavourable inference from it.

Apart from the circumstance just mentioned, the plaintiffs' case seems to me to fail on the facts. If the plaintiffs are to have the benefit of the exception in favour of purchasers or assignees for value without notice, it is for them to prove not only that they gave value but that they had no notice that the mortgage was given on account of liquor furnished in contravention of the Act. If the discrepancy in dates is disregarded, it may be taken as proved that value was given; but the evidence falls short of convincing me that there was no notice of the purpose for which the mortgage was given. The plaintiffs knew of the connection of Ross and Frankfurter with the United Shippers; they knew that a fine imposed upon the United Shippers was to be paid out of the money which they were asked to advance; the mortgage was only for one month and was overdue at the time of the advance; assuming the plaintiffs to have acquired the mortgage (though not by formal assignment) at the time of the advance, they held it for nearly two years without demanding payment, and apparently without inquiring whether the cattle described were in the defendant's possession; Frankfurter has not been asked to pay. In these circumstances, I think something more than the bald statement made by the witness called at the trial is requisite if there is to be a finding that the plaintiffs took without notice of the purpose for which the mortgage was given. I should like to know something more of the relationship, if any, of Ross and Frankfurter to the plaintiffs, and of the reason for making an advance on the security of the mortgage without further inquiry as to the circumstances of the defendant or the existence of the cattle. Standing alone, and

without any real disclosure of the circumstances surrounding the advance, the statement of the witness that he was without knowledge of the purpose for which the mortgage had been given fails to convince me that the plaintiff company had no notice of the illegality.

What has been said is enough to dispose of the case, but it may be added that, in my opinion, proof that the plaintiffs were assignees for value without notice would not have availed to establish their right to enforce the defendant's covenant for payment.

The transaction between the United Shippers and the defendant was prohibited by the Act. It was prohibited by sec. 40 and also by sec. 49, for it was a sale to a person who bought for the purpose of reselling and who was known to the United Shippers to be buying for such purpose. Therefore, apart altogether from sec. 57 of the Act, Schimnowski could not have succeeded in an action on the covenant for payment, whether he sued on behalf of the company (if the sale was really made and the mortgage was really taken for the company) or on his own behalf (if he was the real vendor): *Clark v. Hagar* (1894), 22 Can. S.C.R. 510, 525, 540-1; *Jennings v. Hammond* (1881), 9 Q.B.D. 225; *Shaw v. Benson* (1883), 11 Q.B.D. 363; and an assignee of the mortgage would have been in no better position than Schimnowski himself. That being so, sec. 57 does not help the plaintiffs. That section does not create a right of action where none existed before. By the section it is enacted (1) that payment for liquor furnished in contravention of the Act, whether made in money or securities or labour or property, shall be deemed to have been received without consideration and against justice and good conscience, and that the amount or value thereof may be recovered from the receiver by the person who made it; (2) that every sale, transfer, conveyance, lien and security, in whole or part made, granted or given, for or on account of liquor furnished in contravention of the Act shall be wholly null and void, "save only as regards subsequent purchasers or assignees for value without notice;" and (3) that no action of any kind shall be maintained, either in whole or in part, for or on account of any liquor furnished in contravention of the Act or otherwise in violation of law. The words relied upon by the plaintiffs are in the second of these enactments. There is no need to consider whether the enactment itself was necessary or was inserted as a matter of extra caution (as the third enactment seems to have been), for the words relied upon do no more than say that the statutory declaration of the invalidity of the sales, transfers, conveyances, liens, and securities mentioned shall not operate to

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the prejudice of subsequent purchasers or assignees for value without notice. If on lot No. 12 there had been cattle answering to the description contained in the mortgage (which was a conveyance), and if the plaintiffs (being purchasers for value without notice) had been claiming those cattle, the words relied upon would have been effective to save their claim from being defeated by the second enactment of sec. 57. It may even be—although I should not be prepared so to hold without further consideration—that, as the mortgage was a “security,” an action brought by Schimnowski on the covenant would have been defeated by the second enactment of the section, whereas the saving clause would prevent that enactment from operating to the prejudice of an assignee for value without notice. But my opinion is, as stated already, that no enactment such as the second of those contained in sec. 57 was required to defeat an action on the covenant brought either by Schimnowski or by any one claiming through him; and I think that, inasmuch as it would not be necessary to appeal to the section for protection against a claim on the covenant, no importance attaches to the fact that the second enactment is in effect declared to be passed without prejudice to the position of an assignee for value without notice.

My opinion being that, even if the greatest possible effect is given to the second enactment of sec. 57, the saving clause would not help the plaintiffs, even if they were proved to be assignees for value and without notice, there is no need to discuss the effect of the third enactment, which, standing by itself, would perhaps defeat an action on the covenant in question, by whomsoever brought—indeed, it would be inadvisable, in a case which does not raise the point directly, to express an opinion as to whether, reading the section as a whole, the second enactment ought to be treated as relating to the title to property and the third to all actions brought to compel payment of the price, even when the promise to pay has taken the form of a covenant.

The action will be dismissed. I can see no reason why the costs should not follow the event.

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[ROSE, J.]

FARR V. ANNABLE.

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Feb. 9.

*Landlord and Tenant—Distress for Rent—Seizure of Goods of Person other than Tenant—Landlord and Tenant Act, R. S. O. 1914, ch. 155, sec. 31(1)—Restriction—Exception—Time.*

A landlord claiming a right to distrain the goods of a person who is not liable for the rent must shew clearly that that person is one of those in whose favour the restriction is not to apply: sec. 31(1) of the Landlord and Tenant Act; and if the landlord shews that the title of the person claiming to be the owner is derived by assignment from the tenant, he has established his case—it is not necessary to shew that the tenant was tenant at the time of the assignment.

MOTION by the defendant, under Rule 222, for judgment dismissing the action.

The motion was heard by ROSE, J., in the Ottawa Weekly Court.

*J. E. Caldwell*, for the defendant.

*J. Sauvé*, for the plaintiff.

February 9. ROSE, J.:—The action is an action of replevin. By the special endorsement on the writ of summons it appears that on the 20th June, 1924, one Osias Sauvé mortgaged certain goods to the plaintiff to secure a loan; that on the 22nd September, 1924, Sauvé became tenant to the defendant, and that thereafter he took the mortgaged goods to the demised premises; that on the 2nd May, 1925, the plaintiff seized the goods and made a conditional sale of them to the tenant's wife, the plaintiff retaining title pending the payment of the purchase-price in instalments; that the defendant has seized the goods under a distress warrant for arrears of rent which the plaintiff admits to be due.

By sec. 31 (1) of the Landlord and Tenant Act (R.S.O. 1914, ch. 155), it is enacted that the landlord shall not distrain for rent on the goods and chattels of any person except the tenant or person who is liable for the rent, but that this restriction shall not apply in favour of a person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether by way of mortgage or otherwise. The plaintiff's title is so derived from the person who is tenant; but it is contended that the exception to the restriction applies only when the title of the person claiming adversely to the landlord is derived from a person who is tenant at the time of the purchase, gift, transfer, or assignment.



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Neither the cases referred to on the argument—*Re Calgary Brewing and Malting Co.* (1915), 25 D.L.R. 859; *Enright v. Little* (1916), 30 D.L.R. 578; *Poole v. Kirk* (1923), 53 O.L.R. 390—nor any cases that I have found really throw any light on the question, which I think must be decided on the words of the statute alone.

The section begins by placing a widely expressed restriction upon the landlord's common law right to distrain all goods found on the demised premises, but it proceeds to qualify this restriction in various ways, one of the qualifications being that the restriction shall not apply in favour of a person whose title is derived by mortgage from the tenant; in so far as concerns a person whose title is derived in that way, the landlord's common law right is unaffected. It seems to me, therefore, that, if the rule as to strict construction has any application, the landlord, claiming a right to distrain the goods of a person who is not liable for the rent, must shew clearly that that person is one of those in whose favour the restriction is not to apply; that is to say, in the present case, the defendant must shew that the plaintiff's title is derived by mortgage from the tenant. He does shew that the plaintiff's title is derived by mortgage from Osias Sauvé, and that Osias Sauvé is the tenant; and I think, although I recognise the force of the argument to the contrary, that thereby he has established his case. The plaintiff's case, in my opinion, would have been stronger if the words of the section had been, "whose title *was* derived." If the section had been expressed in that way, it could have been argued very forcibly that the important time was the time at which the title was derived: it could have been said that, as Osias Sauvé was not tenant at the time when he executed the mortgage, the plaintiff's title *was* not derived by mortgage from the tenant. But the use of the word *is* seems to me to make the time at which the distress is attempted to be made the important time: at that time, in the present case, the plaintiff's title is a title derived by a mortgage from the person who is the tenant, and I think it is a title derived by assignment from the tenant within the meaning of the section.

For these reasons I think the motion ought to be granted, and the action dismissed with costs.

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[GRANT, J.]

## RE SOLICITORS.

1926.

Feb. 12.

*Solicitors—Taxation of Bills of Costs Rendered to Client—Form of Bills—Details of Services Rendered—"Lump Sum Charges"—Powers of Taxing Officer—Direction to Insert in Bills Amount Charged for each Service—Solicitors Act, sec. 34(3) (10 & 11 Geo. V. ch. 45, sec. 2)—Rule 757—Services in Litigation—Application of Party and Party Tariff—Further Allowances—Practice.*

Where bill of costs rendered by solicitors to a client contained full particulars of services rendered by the solicitors, but, instead of shewing separate amounts charged for each service rendered, shewed lump sum charges only, and the bills in that form came before the Taxing Officer for taxation:—

*Held*, having regard to the meaning and effect of subsec. 3 of sec. 34 of the Solicitors Act (enacted in 1920 by 10 & 11 Geo. V. ch. 45, sec. 2), and of Rule 757, that the Taxing Officer was not authorised by either to require the solicitors to insert in the bills, after each item of service, the amount charged by the solicitors for that item; and that the bills as rendered satisfied the requirements of the Solicitors Act and the Rules of Court.

Review of the authorities.

Where the services of solicitors, as charged for in bills of costs, have been rendered in the conduct of actions or proceedings in courts, for which there is prescribed by the Rules a party and party tariff, that tariff is to serve as a guide in the preparation of bills for taxation between solicitor and client—the Taxing Officer being empowered to make further allowances.

*Re Solicitor* (1920), 47 O.L.R. 522, and *Re Solicitor* (1922), 53 O.L.R. 34, followed.

An appeal by a firm of solicitors from the Taxing Officer's certificate upon the taxation of eight bills of costs rendered by the solicitors to a client.

January 27. The appeal was heard by GRANT, J., in the Weekly Court, Toronto.

*The Hon. N. W. Rowell, K.C.*, and *H. S. White, K.C.*, for the solicitors.

*J. A. C. Cameron, K.C.*, for the client.

February 12. GRANT, J.:—An appeal by the solicitors from the report and certificate of the Taxing Officer bearing date the 3rd December, 1925. Some eight bills of costs were brought in for taxation as between solicitor and client, the bills containing very exhaustive particulars of services rendered by the solicitors, but not shewing a separate amount charged for each item of service rendered. The client by her counsel made an application to the Taxing Officer for a direction that the solicitors should be required to furnish further details "by inserting in the bills the amount claimed with respect to each of the individual items." On

Grant. J. p. 2 of the certificate of the Taxing Officer he states that his conclusion is "that with respect to each of them" (i.e. the bills)  
1926. "there is no valid reason why the further particulars asked for  
RE by the client should not be given, but that, on the contrary, there  
SOLICITORS. are several reasons why they should." On p. 3 of his certificate the Taxing Officer states that "these services, it may be noted, are set out in the most minute detail." At a later stage he expresses the opinion that the amendment to sec. 34 of the Solicitors Act, R. S. O. 1914, ch. 159, made in 1920 by 10 & 11 Geo. V. ch. 45, sec. 2, adding to sec. 34 a new subsection (3), which provides that, upon taxation, "if it is deemed proper further details of the services rendered may be ordered," gives him the right and power to order the insertion of the amounts of the charges for the various items of services rendered, and that the stating of the amounts of the individual items for services is a further detail which he orders to be furnished, and issues his certificate in the usual manner to that effect.

Counsel for the solicitors upon the appeal, in addition to the usual grounds, urged that the bills were referred to the Taxing Officer by order of the Court in the usual manner, that such order had not been moved against, and that therefore the Taxing Officer could not take exception to them; that, in consequence, his order or direction was a ruling by the Taxing Officer that the bills were not as required by law, and that he had no power to make any such ruling; that the amendment to the Solicitors Act and the provisions of Rule 757, relied upon by the Taxing Officer, did not as a matter of law justify the making of any such order or direction on his part.

Numerous authorities have been cited to me, all of which I have read, but in the view which I take of the matter any extended reference to the older cases is not likely to be of benefit or assistance.

To one who has been engaged in active practice as a solicitor during more recent years, it must have been abundantly apparent that in large measure the practice which formerly obtained regarding the form of accounts rendered by solicitors to their clients has very largely fallen into disuse. With the growth of the country there has been a growth in the size and importance of business transactions entrusted to the care and management of members of the legal profession. Larger commercial and other enterprises have brought business of greater magnitude, involving large sums of money, and in turn rewarding the solicitors engaged with remuneration more or less proportioned to the magnitude of the business

transacted. In the vast majority of these matters an itemised bill is neither rendered nor desired. It is well known that half a page of foolscap is frequently considered to supply sufficient space in which to mention in very general terms the services rendered in this or that or the other transaction with a lump sum fee charged for the services.

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This is undoubtedly a rapidly growing custom and practice among solicitors. That the practice of setting out particulars of the services rendered and merely stating a lump sum has been from time to time recognised by the Courts of this Province as a suitable and proper practice, nay more, in some cases as the most suitable and convenient practice, is shewn by numerous cases extending over a considerable number of years. Examples are to be found in *Re R. L. Johnston* (1902), 3 O. L. R. 1, decisions of the late Chancellor and of the King's Bench Division; *Re Solicitors* (1911), 2 O.W.N. 596, 18 O.W.R. 366, a decision of Middleton, J., from which (18 O.W.R. at p. 367) the following quotation is taken:—

“*Re Johnston* does not in any way define the class of cases in which the solicitor is justified in making a lump charge covering many items. Manifestly many cases arise in which there are a series of consultations and interviews in the course of negotiations, and it is quite impossible to divide and allocate the sum proper to be paid between the different ‘items’ of work done.”

In *Lynch-Staunton v. Somerville* (1918), 44 O.L.R. 575, a decision of the Appellate Division, many of the authorities are reviewed, and from it (Riddell, J., at pp. 581, 582, and Kelly, J., at p. 582), the following quotations are made:—

Riddell, J.: “Common sense, I venture to think, indicates that the amount of remuneration a lawyer should receive depends to some extent on the magnitude of the interests concerned, and more upon the skill which he manifests in his client's behalf than upon the number of interviews he may have or the time spent. When negotiating for a settlement in a matter of importance, it is often impossible to attach a particular value to a particular interview and less or more to another: nor should either the client or the Taxing Officer require it. It is infinitely better to state in reasonable detail what the lawyer has done and what he has accomplished, and from the whole course of the transaction determine the fee to be allowed. I entirely agree in what has been said in *Re Solicitor* (1917), 12 O.W.N. 191, at p. 192: ‘Where a professional man is called upon to advise upon a complicated situation and to take charge of investigations and negotiations, his fee can



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1926. shewn in what was done than by a summation of items each at-  
tached to an individual move in the game played with living per-  
sons; and, finding no case binding upon us which precludes me  
RE from so holding, I am of opinion that this bill answers the statute.”  
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Kelly, J.: “ I readily subscribe to what was said by Middleton, J., in *Re Solicitors* (1911), 2 O.W.N. 596, 18 O.W.R. 366, that many cases arise in which there are a series of consultations and interviews in the course of negotiations, and it is quite impossible to divide and allocate the sum proper to be paid between the different ‘items’ of work done; and there are other cases where the work in its nature is an ‘entire’ thing incapable of intelligent subdivision; and again: ‘When a solicitor is employed to adjust a matter of difficulty, nothing more injurious to the client could be suggested than that the solicitor’s remuneration must depend upon the length of time taken and the number of interviews had. One may grasp a situation with great rapidity, and his skill and experience may lead to its satisfactory solution in a way that after the event appears easy. Another, lacking the necessary skill and experience, may plod away at great length and in the end fail to reach as satisfactory a result, but an itemised bill would give him greater remuneration.”

Adverting for a moment to the Solicitors Act and Rules of Practice, the former is to be found in R.S.O. 1914, ch. 159, sec. 34, of which subsec. 1 makes provision that no action shall be brought for the recovery of fees, etc., until one month after the delivery of the bill. Subsection 2 provides that it is not necessary in the first instance to prove the contents of the bill at all, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, duly subscribed, was delivered; but the other party may shew that the bill so delivered was not such a bill as constituted a compliance with the Act.

In 1920, apparently recognising the change in the actual practice of solicitors in respect of the form of bill delivered to clients, the Legislature passed ch. 45, by sec. 2 of which a further subsection (3) was added to sec. 34 of the Solicitors Act above mentioned. This subsec. 3 reads as follows:—

“(3) A solicitor’s bill of fees, charges or disbursements shall be sufficient in form if it contains a reasonable statement or description of the services rendered, with a lump sum charge or charges therefor, together with a detailed statement of disbursements, and in any action upon or taxation of such a bill if it is deemed proper further details of the services rendered may be ordered.”

This subsection is here written in full, as, by reason of argument presented before me, extended reference to its language may be necessary.

It is convenient at this point to refer to one of the Consolidated Rules of Practice, No. 757, which reads as follows:—

“All Taxing Officers shall, for the purpose of any taxation, have power to administer oaths and take evidence, direct production of books and documents, make certificates, and give general directions for the conduct of taxations before them.”

Before proceeding further it is convenient to refer to the interpretation placed upon the language of this Consolidated Rule by the Taxing Officer, with which interpretation, with respect, I find myself unable to agree. The Taxing Officer states that, apart from the amendment to the Solicitors Act (*supra*), “I am empowered by Consolidated Rule 757 to give general directions for the conduct of taxations before me; and this, in my opinion, is wide enough to include the direction which I propose to make.” He then proceeds to direct that the solicitors shall furnish particulars “by indicating upon the several bills the respective amounts claimed for the various services therein set forth.”

With due respect for the opinion of the Taxing Officer, I do not think Rule 757, giving the usual and ordinary meaning to the words used, is properly capable of the interpretation placed upon it by him. The only portion of the rule which could be so construed would be the last clause, whereby the Taxing Officer is empowered to “give general directions for the *conduct of taxations*.” This means surely that he is empowered to determine the manner in which the taxation is to be conducted and any other particulars which pertain to the conduct of it; the language, as I understand it, does not in any sense apply to the form or contents of the bills of costs to be submitted for taxation. If it were intended by this rule in any way to alter or vary or amend the provisions of the Solicitors Act the rule would undoubtedly state so, in clear language. I do not think any alteration of the statute was intended, nor is any alteration effected therein by the rule.

Then turning to the provisions of the amendment to the Solicitors Act quoted above, I note that the Taxing Officer relies upon this also as authorising him to direct the solicitors to give the further particulars demanded on behalf of the client by inserting in the various bills opposite the items therein given of services rendered, the several amounts sought to be charged and collected by the solicitors for those services respectively. In other words, the Taxing Officer has concluded that he is authorised by this

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Grant, J. section to require the solicitors to insert after each item of service  
1926. rendered the amount which the solicitors charge for that item.  
RE In this interpretation also I am, with great respect, unable to  
SOLICITORS. concur.

Subsection 3, passed in 1920, states in effect that the solicitor's bill shall be sufficient in form if it contains "a reasonable statement or description of the services rendered, with a lump sum charge or charges therefor, together with a detailed statement of disbursements." It goes on to provide that upon action taken or taxation had of the bill, if it is deemed proper, "further details of the services rendered may be ordered." It is to be noted that the subsection refers to a statement or description "of the services rendered;" it also refers to "a lump sum charge or charges therefor," and then it provides that "further details of the services rendered may be ordered," not further details of the "lump sum charge or charges," nor further details of the services rendered with the lump sum charge or charges therefor, but merely further details of the services rendered. It appears to me obvious that the Legislature, having referred in express words to "services rendered," and then in express words to "charge or charges therefor," and thereafter referring again to "services rendered," of which details may be ordered, must be understood to have intended just what the language states, namely, that the further details were to be of the services rendered and not of the "charge or charges therefor." In other words, the Legislature is to be understood as meaning what it says. I am therefore, with respect, forced to disagree with the decision of the Taxing Officer in this regard.

The report and certificate of the Taxing Officer state explicitly that the solicitors have furnished, in their bills, minute details of the services rendered; and, subject to what I have to state with respect to certain of the bills, my conclusion is that the bills as rendered satisfy the requirements of the Solicitors Act and the Consolidated Rules.

Reference was made on the argument before me to a decision of Middleton, J., in *Re Solicitor* (1920), 47 O.L.R. 522, which was approved and followed by Orde, J., in *Re Solicitor* (1922), 53 O.L.R. 34. The decision of Middleton, J., which apparently was given before the amendment to the Solicitors Act passed that year, dealt with the matter of the additional allowances which were to be made in the discretion of the Taxing Officer over and above the allowance provided for by the party and party tariff. On p. 524 of the report in 47 O.L.R., the learned Judge, after stating "that, while the party and party tariff remains as a guide

in all taxations as between the solicitor and his client, the officer taxing may make further allowances," goes on to state how such further allowances may be made, giving examples such as the increasing of the amounts to be allowed on motions or attendances at trial or preparation for trial, etc., etc. Further down on the same page, 524, the learned Judge uses this language: "As between solicitor and client, *outside of the formal matters as to which the party and party tariff forms a guide, only to be departed from in exceptional cases*, the taxation between the solicitor and his client resolves itself into an assessment on the *quantum meruit* basis, into which all factors essential to fair play and justice enter."

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I take this to mean that where the solicitor's services were rendered in the conduct of actions or proceedings in the courts for which there is prescribed by the Rules a party and party tariff, such tariff, in the taxation of bills for such services, is to serve as a guide even as between solicitor and client, the Taxing Officer being empowered to make further allowances. This is in accord with the view of Orde, J., in the case reported in 53 O.L.R. (*supra*). He refers particularly to the decision of Middleton, J., above quoted. The latter decision was with respect to the costs as between solicitor and client incurred in an action in the courts, and, if I understand aright the decision of my brother Middleton, it is to bills of costs for services rendered to clients in actions or proceedings in the courts that he has reference, and not to services of a general nature or character in respect of matters to which the tariffs prescribed by the Rules have no application. As to such services of a general character and the making of a lump sum charge therefor, the cases mentioned above beginning with *Re R. L. Johnston* apply.

Dealing with the bills of costs as rendered in the case at bar, there are four bills which appear in part at least to contain charges for professional services rendered to the client in actions in the courts, and with respect to which bills "the tariff forms a guide but the Taxing Officer is empowered to make further allowances." These four bills are intituled, "Small v. Small," "Small Estate, re Flynn," "Small Estate, re Abbott," "Small Estate, re Simpson."

Following and adopting the decisions of Middleton, J., and Orde, J., in the case of the four bills mentioned, I am of opinion that the solicitors should set out the various items of services contemplated by the regular form of tariff with the amounts which they seek to charge the client for such particular items of the tariff: that is, the bills should be made up on what is com-



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monly spoken of as the block system, with charges for the tariff portions of the work done; and that the solicitors, in addition to the items or series of items provided for by the tariff, should insert for additional or extra services rendered the items of such services, and, either in a lump sum or in several lump sums as the solicitors may prefer, the amounts sought to be charged therefor.

As to three of the other bills, namely, "Small Estate General," "Small and Transcanada Theatres," and "Small and Doughty," I am of opinion that the solicitors, having given, as the Taxing Officer states, minute details of the services rendered, and having made a lump sum charge therefor, have complied with the requirements of the Solicitors Act and the Rules of Practice and are entitled to have these three bills taxed in that form. These three matters appear to me to be pre-eminently matters with respect to which the language of Riddell, J., and Middleton, J., quoted above, applies with peculiar force and fitness. Services in such matters are of such a special character as to justify the rendering by solicitors of bills containing particulars of the services rendered with merely lump sum charges inserted with respect to such services.

The other bill rendered, dealing in part at least with the efforts to procure probate of the will of the deceased, which efforts ultimately proved successful, should, in my opinion, conform in part to the tariff requirements prescribed with respect to applications for probate. I think in the matter of this bill that the solicitors might and should, in so far as the tariff is applicable, conform to the tariff, and that in respect of tariff items the Taxing Officer should make the further allowances permitted to be made by him; and that with regard to other matters more or less directly connected with the application for probate and appearing in the same bill as rendered, but for which there are no tariff items prescribed, the solicitors should, as in other bills above mentioned, be permitted to make a lump sum charge or lump sum charges as the solicitors may prefer. It would seem to me that in such matters the services might with advantage be divided under a few separate headings, such as conferences with client, conferences with other solicitors, conferences with police officials, correspondence, etc.: but as I view the practice governed by the statute and rules, the solicitors are not bound to do this, and I am not to be understood as directing that it shall be done. I am merely making the suggestion as one which might be followed for the convenience both of the solicitors and of the Taxing Officer.

Subject as appears above, the appeal of the solicitors will be allowed, and, with the amendment by the solicitors of certain bills in accordance with the above directions, the taxation should proceed. Adopting and following the views expressed by learned Judges in decided cases, I think it is better to state in reasonable detail what the solicitors have done and what they have accomplished, and from the whole course of the transaction determine the fee to be allowed; and further that their fee can be better estimated by the result attained and care and skill shewn in what was done than by any summation of items each attached to an "individual move in the game played with living persons."

As this appeal has been attended in the main with success, the solicitors will be entitled to costs of the appeal.

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[APPELLATE DIVISION.]

RE TOWN OF FORD CITY AND COUNTY OF ESSEX.

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*Appeal—Equalization of Assessment—Special Court of Three Appointed under the Assessment Act, R.S.O. 1914, ch. 195, sec. 87 (4)—Finality of Decision of—Effect of subsecs. 12 and 13—Practice—Motion to Quash Appeal.*

Feb. 17.

Where the equalization of the assessments of the minor municipalities in a county has been made by a court of three constituted under subsec. 4 of sec. 87 of the Assessment Act, no appeal lies from the decision of that court to a Divisional Court of the Appellate Division, although an appeal does lie when the equalization has been made by the County Court Judge alone: see subsecs. 12 and 13 of sec. 87.

*Re Township of Stamford and County of Welland* (1916), 37 O.L.R. 155 (see pp. 163, 166, 191), explained and distinguished.

Where an appeal which has been set down does not lie, the proper practice is for the respondent to move promptly to quash it.

MOTION by the Municipal Corporation of the County of Essex to quash an appeal launched by the Municipal Corporation of the Town of Ford City from the decision of a Court composed of the Judges of the County Courts of the Counties of Essex and Kent and the Sheriff of the County of Essex, in respect of the equalization of assessments by the county council.

February 16. The motion was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*H. S. White*, K.C., for the applicant corporation.

*H. J. Scott*, K.C., for the town corporation, the appellant.

February 17. RIDDELL, J.A.:—Certain of the Townships of the County of Essex not being satisfied with the equalization by

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the County Council, the matter was disposed of by the Judges of the Counties of Essex and Kent and the Sheriff of the County of Essex, who gave their decision as a Court constituted under the Assessment Act, R.S.O. 1914, ch. 195, sec. 87(4). \*

The Town of Ford City, not being satisfied with this decision, served notice of an appeal to this Court from the decision of the Court so constituted.

A motion is now made to quash the appeal, and the question arises whether an appeal can be taken to this Court from the Court so constituted. The decision of the question will, of course, depend upon the interpretation of the Act. and in that regard the history may be looked at.

By the Ontario statutes 32 Vict. ch. 36, sec. 71(3), and 37 Vict. ch. 19, sec. 23, consolidated in R.S.O. 1877, ch. 180, sec. 68(2), an appeal against the equalization by a county council was given to the Judge of the County Court of the county. In 1879 this legislation was repealed and an appeal given to the County Court Judge, the Sheriff, and "such third person as the county council may appoint, and they shall constitute a court for that purpose:" 42 Vict. ch. 31, sec. 33 (Ont.)

The Act of (1880) 43 Vict. ch. 27, sec. 18 (Ont.), made the law much as it is to-day—if both parties, i.e., the County and the dissatisfied Township, are "willing to have the final equalization made by the County Judge," that course is to be followed; if not, the Lieutenant-Governor in Council is to appoint two persons, one being the Sheriff or Registrar of the county and the other a Judge of another county—these with the County Judge "shall form a court . . ." So stood the law in R.S.O. 1887, ch. 193, sec. 79(4); (1892) 55 Vict. ch. 48, sec. 79(4); R.S.O. 1897, ch. 224, sec. 88; (1904) 4 Edw. VII. ch. 23, sec. 82(4).

The finality of the decision of either "the Judge" or the "Court" under this legislation was not questionable (except, in the case of the Judge, so far as the *persona designata* legislation might be considered to apply).

\*Section 87 provides for an appeal if any municipality is dissatisfied with the action of any county council in increasing or decreasing or refusing to increase or decrease the valuation of any municipality. The appeal is to the County Court Judge if both the appealing municipality and the county council are willing to have the final equalization of the assessment made by him, but if any party to the appeal objects, the clerk of the county council is to notify the Provincial Secretary; and (subsec. 4) "the Lieutenant-Governor in Council . . . may appoint two persons, one of whom shall be the sheriff or registrar of the county in which the appeal is made, and the other a Judge of another county, who together with the County Judge shall form a Court . . . and the Court shall equalize the whole assessment of the county and shall forthwith report the same to the county council.

There existing the two methods of determining the matter, when it was decided to give an appeal, the appeal was limited to the adjudication of the Judge; and no provision was made for an appeal from the adjudication of the other tribunal.

In 1913, by the Act 3 & 4 Geo. V. ch. 46, sec. 14(3), sec. 82 of the Assessment Act, 4 Edw. VII. ch. 23, was amended by adding paras. 10 and 11, by which it was provided:—

“10. An appeal shall lie to a Divisional Court of the Appellate Division of the Supreme Court from any judgment of the Judge on a question of law or the construction of a statute, and if the judgment of the Divisional Court reverses or varies the judgment of such Judge he shall change or vary his judgment so as to conform to the judgment of the Divisional Court.

“11. The procedure on such appeal shall be, as nearly as may be, the same as upon an appeal from a County Court to a Divisional Court of the Supreme Court.”

These paragraphs are found in substantially the same language in R.S.O. 1914, ch. 195, at paras. 12 and 13 of sec. 87.

The two methods of determining the equalization are by (1) a Judge or (2) a Court composed of two Judges and a Sheriff or Registrar—the terminology in the appeal section “any judgment of the Judge” is wholly inappropriate to a judgment of the Court. For whatever reason, the Legislature decided that the parties are not to be compelled to abide by the County Judge’s decision in matters of law—a dissatisfied party may take the opinion of a Divisional Court; but if the decision of a Court of three is desired in the first instance, no appeal is given—that Court has the same right to make mistakes as we have.

We are pressed with certain language used in *Re Township of Stamford and County of Welland* (1916), 37 O.L.R. 155, at pp. 163, 166, etc. These are *obiter dicta*, not necessary for the decision of the case, no part of the *ratio decidendi*, and are clearly *per incuriam* so far as they state that there is an appeal from “the Board . . . to this Court” (p. 163).

The practice is well established that where an appeal does not lie, a motion should be made promptly to quash the appeal: in some doubtful cases, such a motion has been adjourned to be heard with the appeal on the merits, but in more cases, where he has not so moved, the respondent has not been allowed any more costs than of a motion to quash.

The proper practice has been followed in the present case, and the appeal should be quashed with costs.

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 Masten, J.A. MASTEN, J.A.:—I also agree. Referring to the opinion which Mr. Scott suggests that I expressed in the *Stamford* case, 37 O.L.R. at p. 191, I am not conscious that I ever considered, much less formed an opinion, that an appeal lies to this Court from the judgment of a Court appointed under subsec. 4 of sec. 87 of the Assessment Act. That is *not* my opinion, and I certainly did not intend by anything I said in that case to express an opinion on a point which was not relevant to an appeal from the decision of a County Court Judge.

*Order quashing the appeal with costs.*

[APPELLATE DIVISION.]

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RE FULTON.

Feb. 19.

*Bankruptcy—Chattel Mortgage—Unjust Preference—Security for Old Debt and New Advance—Bankruptcy Act, secs. 31, 32—Security Void in Toto.*

A chattel mortgage, dated the 27th May, 1924, to secure \$3,800, was made by F. to his brother, and F. was declared bankrupt upon a petition filed on the 21st June, 1924. It was said that \$2,200 of the \$3,800 represented a new advance made by the chattel mortgagee at the date of the mortgage. The \$2,200, so far as could be ascertained, did not reach any of the creditors of the mortgagor, and there was nothing before the Court to shew what was done with it. If the advance was made at all, it was made with full knowledge by the mortgagee of the hopelessly insolvent condition of the mortgagor:—

*Held*, the onus being on the chattel mortgagee to uphold his security, and the finding of the trial Judge being that the mortgage was given and taken for the purpose of effecting an undue preference, that the mortgage could not be held valid as to the \$2,200.

The whole transaction, being from its inception contaminated by the improper desire to obtain a preference, was invalid under sec. 31 of the Bankruptcy Act, and was not brought within any of the saving provisions of sec. 32. There was nothing in the Bankruptcy Act which would justify a division of the security.

*Commercial Bank v. Wilson* (1866), 3 E. & A. 257, followed.

*Campbell v. Patterson, Mader v. McKinnon* (1893), 21 Can. S.C.R. 645, distinguished.

An appeal by C. D. Fulton, chattel mortgagee, from the judgment of MEREDITH, C.J.C.P., upon the trial (on the 5th October, 1925) of an issue directed by the Bankruptcy Judge, finding a chattel mortgage given by J. L. Fulton, the debtor, to his brother, the appellant, to be an unjust preference.

The appeal was limited to the contention that the chattel mortgage was valid to the extent of the sum of \$2,200 said to have been advanced at the time of the execution of the chattel mortgage.

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January 8. The appeal was heard by LATCHFORD, C.J., HODGINS and MIDDLETON, J.J.A., and LENNOX, J.

*Gideon Grant*, K.C., for the appellant, said that the question was whether the present advance of \$2,200 was a preference. He argued that the mortgage was valid with respect to this sum, as it increased the value of the assets of the estate to that extent. The mortgage was capable of being severed, so that it might be declared invalid in part and valid in part: *Re David* (1924), 27 O.W.N. 268, affirmed in (1925) 29 O.W.N. 210; *In re W. H. Fox* (1924), 5 C.B.R. 328; *In re Duquay & Co.* (1922), 3 C.B.R. 606; *In re Manuel* (1923), 3 C.B.R. 628; *Briscoe v. Molsons Bank* (1922), 51 O.L.R. 644, 2 C.B.R. 382; *Burns v. Royal Bank of Canada* (1922), 51 O.L.R. 564, 2 C.B.R. 241; *Re Goldstein* (1923), 53 O.L.R. 60. This \$2,200 was an actual *bonâ fide* advance, made with the intention that the mortgagor should continue to carry on his business.

*George Kerr* and *H. P. Edge*, for the trustee in bankruptcy, respondent, contended that, when the advance was made, the mortgagee had full knowledge of the hopelessly insolvent condition of the mortgagor, which in itself was evidence of bad faith. The onus was upon the mortgagee to uphold his security, and he had failed to satisfy the onus. Then there was the finding of the learned Chief Justice that the mortgage had been given for the purpose of effecting an undue preference. This invalidated the security in its entirety: *Re Shulman* (1923), 23 O.W.N. 605; *Re Thompson* (1923), 25 O.W.N. 276.

February 19. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by a chattel mortgagee from the judgment of the Chief Justice of the Common Pleas upon the trial of an issue directed by the Judge in Bankruptcy to determine the validity of the chattel mortgage in question.

The chattel mortgage bears date the 27th May, 1924, and was to secure the sum of \$3,800, of which it was said that \$2,200 represented a new advance by the chattel mortgagee to his brother, the bankrupt, and \$1,600 represented an old indebtedness. The petition in bankruptcy was filed on the 21st June, 1924, so that the onus is upon the chattel mortgagee to uphold his security.

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By arrangement between the parties, the goods covered by the chattel mortgage were sold; they realised the sum of \$3,300, which was held to abide the result of this litigation. The \$2,200 said to have been advanced, so far as can be ascertained, did not reach any of the creditors of the bankrupt, and there are no entries in the books shewing what was done with it. The only entry in relation to it is an entry shewing the advance by the chattel mortgagee.

Everything points to the advance being made, if it was in truth made at all, with full knowledge of the hopelessly insolvent condition of the mortgagor-brother. The learned Chief Justice found, and the evidence amply justifies his finding, that the mortgage was given and taken for the purpose of creating an undue preference of the mortgagee-brother. The learned Chief Justice held that this was sufficient to invalidate the security in its entirety, and so declared.

The appeal here is limited to the contention that the mortgage should not have been invalidated entirely, but that it should have been declared to be valid with respect to the sum of \$2,200 said to have been advanced. It is said that the payment of this sum increased the assets of the estate by the amount advanced, and that the mortgage ought to be regarded as capable of being severed, so that it may be declared valid in part.

Upon the question of fact there is no doubt that the \$2,200 did not in fact increase the assets of the estate in any tangible way. What became of it is not shewn. It did not reach the trustee in bankruptcy, and it did not go to any of the mortgagor's creditors. It was possibly intended to be paid on account of certain notes upon which the brother was endorser. It was not so applied, for the brother says that he had to pay these notes. The debtor was not called, and no explanation of the fate of the \$2,200 is given.

A creditor who makes an advance and takes a security not for that advance alone but also for a pre-existing debt, for which he seeks to obtain a preference, is not in the happy position, when his scheme to obtain the preference for his old debt fails, of being able to say that the security must stand as good so far as any new advance is concerned, even though it is void under the Bankruptcy Act so far as the old debt is concerned. The scheme is a device for obtaining a preference, and the new advance is in real peril if the scheme fails.

The question does not seem to have been seriously considered since the passing of the present statute, secs. 31 and 32 of the Bankruptcy Act. Section 31 makes every conveyance, etc., taken

with the view of giving a creditor a preference over the other creditors void as against the trustee in bankruptcy if the person making the mortgage and giving the security is adjudged bankrupt on a petition presented within three months after the date of the impeached security; and, if the conveyance has the effect of giving a preference, it shall be presumed *primâ facie* to have been made with the intention of giving the preference. Section 32 protects certain transactions made in good faith, where there is no notice of any available act of bankruptcy on the part of the transferor.

In the case of *Commercial Bank v. Wilson* (1866), 3 E. & A. 257, it was decided that a transaction fraudulent against creditors as to part of the sum involved is void as against creditors *in toto*, and, so far as I know, that case stands unchallenged at the present time. The statute there under consideration was the Statute of Elizabeth.

In *Campbell v. Patterson*, *Mader v. McKinnon* (1893), 21 Can. S.C.R. 645, a case arising under the provisions of the Assignments and Preferences Act was held to be distinguishable from *Commercial Bank v. Wilson* because of the provision found in the statute that nothing contained in the section invalidating the preferential transaction was to apply to any transfer of any goods made by way of security for any present, actual, *bonâ fide* advance of money. This, the Supreme Court held, enabled the mortgage to be held to be valid in so far as an actual present advance was proved, although it was invalid in so far as the pre-existing debt was concerned.

There is nothing in the Bankruptcy Act which would justify a division of this security, for it does not require the transaction here impeached or any part of it to be held to be valid. The whole transaction was, I think, from its very inception, invalid and contaminated by the improper desire to obtain a preference, and the case is not brought within any of the saving provisions of sec. 32.

There are isolated expressions to be found here and there in the opinions of single Judges looking some the one way and some the other, but none of them indicates that the precise point has been the subject of consideration. For example, the opinion of Mr. Justice Chisholm in *In re Manuel*, 3 C.B.R. 628, appears to be in favour of upholding the security for the amount actually advanced, but it is to be observed that his opinion is a pure dictum and not the result of any discussion of the question. Against this may be set off the opinion of Mr. Justice Fisher in *Re Shulman*, 23 O.W.N. 605, 3 C.B.R. 646, where it is said that the

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App. Div. transfer will be set aside *in toto* although made in part for a  
 1926. present advance. That decision was affirmed upon appeal in  
 RE 24 O.W.N. 90, 4 C.B.R. 275, but this matter was not there dis-  
 FULTON. cussed at all.

Middleton, No good purpose can be served by enumerating other decisions  
 J.A. in which the point was taken for granted or merely stated, without  
 investigation or discussion, by Judges whose opinion would not be  
 binding upon an appellate court.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

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RE INSURANCE CONTRACTS.

Feb. 19.

*Constitutional Law — Insurance Legislation — Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, secs. 168, 180—Statutory Conditions in Automobile, Accident, and Sickness Insurance—Intra Vires—Dominion Insurance Act, 1917, 7 & 8 Geo. V. ch. 29, secs. 11, 12(1), 71, 71A, 134, 134A—Amending Acts, 1923, 13 & 14 Geo. V. ch. 55, and 1924, 14 & 15 Geo. V. ch. 50—Ultra Vires—British North America Act, secs. 91, 92—Aliens—Foreign Companies.*

It is within the legislative competence of the Legislature of Ontario to enact such provisions as are contained in secs. 168 and 180 of the Ontario Insurance Act, 1924.

*Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96, followed.

It is not within the legislative competence of the Parliament of Canada to enact such provisions as are contained in the Dominion Insurance Act, 1917, secs. 11, 12(1), 71, 71A (the two latter as enacted by ch. 50 of the Statutes of Canada 1924), and 134 and 134A (the latter as enacted by ch. 55 of the Statutes of Canada 1923); LATCHFORD, C.J., dissenting, and SMITH, J.A., dissenting in part.

Review of the authorities and discussion of provisions of secs. 91 and 92 of the British North America Act.

CASE referred to the Appellate Division by the Lieutenant-Governor of Ontario, pursuant to the provisions of the Constitutional Questions Act, R.S.O. 1914, ch. 85.

The questions referred for hearing and consideration were as follows:—

(1) Is it within the legislative competence of the Legislature of Ontario to enact such provisions as are contained in secs. 168 and 180 of the Ontario Insurance Act, 1924?

(2) If the answer to the first question is in the affirmative, is it within the legislative competence of the Parliament of Canada to enact such provisions as are contained in secs. 11, 12(1), 71, 71A.

and 134 of the Dominion Insurance Act, 1917 (secs. 71 and 71A being as enacted by ch. 50 of the Statutes of Canada 1924) ?

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(3) If the answer to the first question is in the affirmative, is it within the legislative competence of the Parliament of Canada to enact such provisions as are contained in secs. 11, 12(1), 71, 71A, and 134A of the Dominion Insurance Act, 1917 (secs. 71 and 71A as enacted by ch. 50 of the Statutes of Canada 1924, and sec. 134A as enacted by ch. 55 of the Statutes of Canada 1923) ?

October 12 and 13, 1925. The case was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and SMITH, J.J.A.

*Edward Bayly*, K.C., and *R. Leighton Foster*, for the Attorney-General for Ontario, argued that secs. 168 and 180 of the Ontario Insurance Act, 1924, were validly enacted, and that secs. 134 and 134A of the Insurance Act, 1917 (Dominion), were *ultra vires* the Dominion Parliament; that the first question should be answered in the affirmative and the second and third in the negative: first, because the subject-matter of the legislation had been decided to be within the exclusive legislative competence of the Province: *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96. See also *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328. They submitted also that in *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588, the Judicial Committee has decided that the Dominion cannot regulate the business of insurance in such a way as to interfere with civil rights in the Provinces. Secondly, because the words, "The regulation of Trade and Commerce," in sec. 91(2) of the British North America Act, do not comprehend the regulation by legislation of the contracts of a particular trade: *Citizens Insurance Co. v. Parsons*, *supra*; *Attorney-General for Canada v. Attorney-General for Alberta*, *supra*; *In re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, at pp. 409 and 410. Thirdly, because the authority of the Parliament of Canada to incorporate companies with other than Provincial objects does not comprehend the regulation of the business of insurance in which those companies may engage or of contracts which they may undertake: *John Deere Plow Co. Ltd. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. Ltd. v. The King*, [1921] 2 A.C. 91, at pp. 100 and 120. Fourthly, because the provincial legislation in question does not destroy or interfere with the capacity or status of Dominion incorporated companies; and because, on the other hand, in pith and substance, as well as in form, the Dominion legislation is

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directed to contracts and not to status or capacity. Fifthly, because this subject-matter is not within sec. 91(25) of the British North America Act, "Naturalization and Aliens," but is an enactment respecting contracts of insurance: *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580. Sixthly, because the Dominion legislation touching the matter of aliens is not "properly framed" within the meaning of the opinion of the Judicial Committee in *Attorney-General for Ontario v. Reciprocal Insurers*, *supra*. Seventhly, because the Dominion legislation is not an enactment in relation to aliens as such or Dominion companies as such. It is clearly in substance an enactment in regulation of contracts of insurance and the business of insurance as such. Eighthly, because the Parliament of Canada cannot undertake to do indirectly what cannot be done directly: *Great West Saddlery Co. v. The King*, *supra*. Other cases referred to dealing with the questions were: *Attorney-General for Ontario v. Attorney-General for Canada*, [1894] A.C. 189; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571; *Colonial Building and Investment Association v. Attorney-General for Quebec* (1883), 9 App. Cas. 157; *La Compagnie Hydraulique de St. François v. Continental Heat and Light Co.*, [1909] A.C. 194; *Dobie v. Temporalities Board* (1882), 7 App. Cas. 136; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *City of Montreal v. Montreal Street Railway*, [1912] A.C. 333; *Russell v. The Queen* (1882), 7 App. Cas. 829.

*F. W. Wegenast*, for Reciprocal Insurers, submitted that they were not in the insurance business; they only made contracts with one another. [THE COURT asked what interest the Reciprocal Insurers had in the reference.] *Wegenast* said that what his clients were anxious to have decided was whether a person, for instance, one of his clients, being an alien, would come under this Dominion legislation. [RIDDELL, J.A.:—We have nothing to do with that.] *Wegenast*. Well, if I am not interested in the reference, I am content. If my clients have no place in the reference, they need not take out a Dominion license.

*V. Evan Gray*, for the Canadian Automobile Underwriters' Association and the Canadian Casualty Underwriters' Association, said that he was not taking sides with either the Dominion or the Province, but would like to know under which jurisdiction he was. He agreed, however, for the most part, with the argument of counsel for the Attorney-General for Ontario.

*Sir William Hearst*, K.C., special counsel appointed by the Court to represent the Dominion, contended that the answers to

questions 2 and 3 should be in the affirmative, because the Dominion Act in no way affected any Provincial company. Then, as to the right of the Dominion to license companies, this power came under "Regulation of Trade and Commerce" and "Naturalization and Aliens:" *Grand Trunk Railway Co. of Canada v. Attorney-General for Canada*, [1907] A.C. 65. Having created a company, the Dominion could say, "You must not do business in a certain way:" *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328, at pp. 346 and 347. The Dominion could not compel a provincial company to take out a Dominion license; but, if the provincial company wanted to do business throughout Canada, it must get a Dominion license. He also contended that the license was revocable if the company did not comply with the conditions imposed. Under "Regulation of Trade and Commerce" and "Naturalization and Aliens," the Dominion had the right to license British and foreign companies. The legislation in question did not trench on civil rights in Ontario, but was directed solely to British and alien persons and companies and the conditions of their entry into Canada; and the conditions imposed upon them were within the rights of the Dominion: *Bonanza Creek Gold Mining Co. Ltd. v. The King*, [1916] 1 A.C. 566. Conceding that as to contracts made within the Province, question 1 may be answered in the affirmative, yet if the legislation professes to give powers outside the Province, it is *ultra vires*. He also referred to *Farmers Mutual Hail Insurance Association v. Whittaker* (1917), 37 D.L.R. 705, and *Rex v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.

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*Bayly*, K.C., in reply, contended that the Dominion could not tell an alien in the Province that he could not contract, or that he could not deal with lands. The Dominion, in the guise of company legislation, was passing contract legislation, which comes within "Property and Civil Rights." He also referred to *Cunningham v. Tomey Homma*, [1903] A.C. 151.

February 19, 1926. MASTEN, J.A. (after setting out the questions referred to the Court) :—I deal first with question 1. Section 168 of the Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, is as follows :—

"The conditions set forth in this section shall, subject to the provisions of sections 169 and 170, be deemed to be part of every contract of automobile insurance in force in Ontario and the said conditions shall be printed on every policy under the heading 'Automobile Statutory Conditions.'"



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Then follow fifteen statutory conditions referred to in the above section.

Conditions 5 and 9(1) afford fair examples of the nature of these statutory provisions. These two conditions read as follows:—

“ 5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law, or, in any event, under the age of sixteen years, or by an intoxicated person.”

“ 9.—(1) Upon the occurrence of any loss of or damage to the insured automobile, the insured shall, if such loss or damage is covered by this policy,

“(a) forthwith give notice thereof, in writing, to the insurer, with fullest information obtainable at the time, and shall, at the expense of the insurer, and as far as reasonably possible, protect the automobile from further loss or damage, and any such further loss or damage accruing directly or indirectly from a failure to protect shall not be recoverable hereunder. No repairs shall be undertaken or any physical evidence of the loss or damage removed without the written consent of the insurer, except such repairs as are immediately necessary for the protection of the automobile from further loss or damage; or until the insurer has had a reasonable time to make the examination provided for in subsection 2 of this condition.”

Section 180, referred to in question 1, reads as follows:—

“ The conditions set forth in this section shall be deemed, subject to the provisions of sections 181 to 185, to be part of every contract of accident and of sickness insurance in force in Ontario, and shall be printed on every policy hereafter issued under the heading ‘ Statutory Conditions.’ ”

Then follow twenty-one statutory conditions, referred to in the section as quoted. It will suffice to quote two of these conditions as examples merely of the general character of all these provisions:—

“ 2. All statements made by the insured upon the application for this policy shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defence of a claim under this policy unless it is contained in the written application for the policy and unless a copy of the application, or such part thereof as is material to the contract, is endorsed upon or attached to the policy when issued.”

“ 17. All moneys payable under this policy for loss other than

that of time on account of disability shall be paid within sixty days after the receipt of proofs of claim." App. Div.  
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The provisions of secs. 169 and 170 and the provisions of secs. 181 to 185 do not affect the answers to the questions submitted for the consideration of the Court. RE  
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This legislation is similar in all relevant aspects to the legislation respecting statutory conditions in contracts of fire insurance which, in the case of *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96; was held to be within the legislative authority of the Province. It was determined in that case that the legislation there in question fell under that enumerated subhead of sec. 92 of the British North America Act which entrusts to the Provincial Legislature the subject of "Property and Civil Rights."

In the same case it was determined that in No. 2 of sec. 91 the words "Regulation of Trade and Commerce" do not authorise the regulation by the Dominion Parliament of the contracts of a particular business or trade such as the business of fire insurance in a single Province. For more than forty years the judgment in *Citizens Insurance Co. v. Parsons*, *supra*, has been applied as a basis of decision in all our courts, from the Judicial Committee down, and now forms an essential part of the constitutional law of Canada. The circumstance that the legislation now in question might conflict with possible Dominion legislation relative to Aliens and Dominion companies does not remove it from the competency of the Provincial Legislature, as was determined by the Judicial Committee in the *Reciprocal Insurers'* case, [1924] A.C. 328, at pp. 345, 346, where it is said:—

"Nothing in sec. 91 of the British North America Act, in itself, removes either aliens or Dominion companies from the circle of action which the Act has traced out for the Provinces. Provincial statutes of general operation on the subject of civil rights *primâ facie* affect them. It may be assumed that legislation touching the rights and disabilities of aliens or Dominion companies might be validly enacted by the Dominion in some respects conflicting with the Ontario statute, and that in such cases the provisions of the Ontario statute, where inconsistent with the Dominion law, would to that extent become legally ineffective; but this, as their Lordships have before observed, is no ground for holding that the Provincial legislation, relating as it does to a subject-matter within the authority of the Province is wholly illegal or inoperative: *McColl v. Canadian Pacific Railway Co.*, [1923] A.C. 126, 135."

I can find no distinction in principle between the statutory conditions relating to fire insurance and the enactments here in

App.Div. question, and it therefore suffices to say that, following the *Citi-*  
1926. *zens Insurance* case, *supra*, the first question submitted must be  
answered in the affirmative.

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Masten, J.A. *Questions 2 and 3.* It having been determined, in answer to ques-  
tion 1, that legislation regulating the statutory conditions in policies  
of automobile and accident and sickness insurance is insurance legis-  
lation within the exclusive authority of the Provincial Legislature,  
as coming under the head of "Civil Rights," it follows that legis-  
lation on the same subject-matter by the Dominion Parliament can  
be valid only so far as it comes within the principle that subjects  
which in one aspect and for one purpose fall within sec. 92 of the  
British North America Act, may in another aspect and for another  
purpose fall within sec. 91. But that principle is to be applied  
only with great caution, as remarked by Viscount Haldane in  
*Attorney-General for Canada v. Attorney-General for Alberta*,  
[1916] 1 A.C. 588, at p. 596. I understand it is to that principle  
that their Lordships refer in the *Reciprocal Insurers* case, *supra*, to  
which it is now necessary to advert.

Question 2 and 3 now submitted, though not in form, are yet in  
principle, supplementary to the questions considered in that case,  
and the present case cannot be adequately considered without bear-  
ing in mind the observations of the Judicial Committee on that  
appeal and the circumstances there under consideration. In that  
case the facts were that the Legislature of Ontario had in 1922  
passed an Act, known as the Reciprocal Insurance Act, which  
authorised any person to exchange, through the medium of an  
attorney, with persons, whether in Ontario or elsewhere, reciprocal  
contracts of insurance, subject to provisions as to licenses and other  
conditions; and it was provided that actions in respect of such con-  
tracts might be maintained in the Courts of the Province.

A Dominion Act, passed in 1917, 7 & 8 Geo. V. ch. 26, inserted  
in the Criminal Code sec. 508C, by which it was made an indict-  
able offence for any person to solicit or accept any insurance risk  
except on behalf of a company or association licensed under the  
Dominion Act, 1917.

In the *Reciprocal Insurers'* case, the Judicial Committee, in  
answer to the questions submitted by the Lieutenant-Governor of  
Ontario, held, first, that the Reciprocal Insurance Act was validly  
enacted by the Legislature of Ontario, and, second, that the  
making and carrying out of contracts licensed under the Provincial  
Act were not rendered illegal or otherwise affected by sec. 508C of  
the Criminal Code. That section was held invalid because, in  
substance, although not in form, it was in regulation of contracts

of insurance, subjects not within the legislative competence of the Dominion.

The third question submitted was as follows: "Would the answers to questions 1 or 2 be affected, and if so how, if one or more of the persons subscribing to such reciprocal insurance contracts is: (A) A British subject not resident in Canada immigrating into Canada? (B) An alien?"

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In dealing with the question Mr. Justice Duff, who delivered the opinion of the Judicial Committee, says, at pp. 346, 347:—

"In view of the terms of the third question it is necessary to notice a contention of the respondents that sec. 508C can receive a limited effect as applying to aliens within the meaning of sec. 11(b) of the Insurance Act, 1917, and to companies and natural persons not aliens immigrating into Canada within the meaning of sec. 12, and a parallel contention as to the effect of secs. 11 and 12.

"The enactment in question being in substance, notwithstanding its form, an enactment in regulation of contracts of insurance and the business of insurance, subjects not within the legislative sphere of the Dominion, and, subject to the proviso which is not here material, being general in its terms, is in their Lordships' opinion invalid in its entirety. Assuming that it would be competent to the Dominion Parliament, under its jurisdiction over the subject of aliens, to pass legislation expressed in similar terms, but limited in its operation to aliens, their Lordships think it too clear for discussion that sec. 508C is not an enactment on the subject of aliens (just as the Ontario statute of 1922 is not an enactment on that subject); and that the language of the clause in question cannot be so read as to effect by construction such a limitation of its scope. Such a result could only be accomplished by introducing qualifying phrases, indeed, by rewriting the clause and transforming it into one to which the Legislature has not given its assent.

"It follows that the third question must be answered in the negative, but with this qualification, that, in so answering it their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact secs. 11 and 12(1) of the Insurance Act. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, consider it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observation of Lord Haldane, in delivering the judgment of the Board in *Attorney-General for Canada v. Attorney-General for*



App. Div. *Alberta*, to the effect that legislation, if properly framed, requiring  
1926. aliens, whether natural persons or foreign companies, to become  
RE licensed, as a condition of carrying on the business of insurance in  
INSURANCE Canada, might be competently enacted by Parliament (an observa-  
CONTRACTS. tion which, it may be added, applies also to Dominion companies),  
Masten, J.A. and to remark that the second subsection of sec. 12 ascribes an  
inadmissible meaning to the word 'immigrate,' which, if governing  
the interpretation of subsec. 1, would extend the scope of sec. 12 to  
matters not obviously not comprised within the subject of immi-  
gration; and that subsec. 2 is therefore not competently enacted  
under the authority of the Dominion in relation to that subject.  
Their Lordships do not think it proper to discuss the limits of that  
authority, or to intimate any opinion upon the point whether any,  
or, if any, what effect can be given to the first subsection of sec. 12  
as an enactment passed in exercise of it."

Bearing in mind the well-recognised rule that in the discussion  
of questions like the present the Court ought to limit its answers  
strictly to the questions submitted, the present inquiry is, by the  
decision in the *Reciprocal Insurers* case, *supra*, narrowed to this  
question: Is the legislation of the Dominion, referred to in ques-  
tions 2 and 3, "properly framed" so as to be "competently  
enacted?"

To warrant an answer in the affirmative to that question it  
must appear that the legislation here in question does, in its true  
aspect, its object and purpose, relate in the one case to the incor-  
poration of Dominion companies; and in the others to the admis-  
sion into Canada and to the licensing of British or alien persons  
(including companies); rather than to the regulation of the busi-  
ness of insurance. In the alternative, if the conclusion is reached  
that this is in its essence insurance legislation, then it will be valid  
only if it is ancillary to some of those powers which the Dominion  
Parliament admittedly possesses under sec. 91, so as to warrant in  
that way an intrusion by the Dominion on the Provincial field of  
civil rights. And in either event, if the Dominion legislation is  
valid, it must override the Provincial enactment.

With these preliminary observations, I proceed to a more  
detailed consideration of questions 2 and 3, which may be conveni-  
ently treated together, as the same considerations apply to each.

On account of their length I refrain from quoting *in extenso*  
the sections mentioned in these questions, but indicate the substance  
of the enactment so far as seems necessary for a consideration of  
its constitutionality.

Section 11 of the Dominion Insurance Act, 1917, 7 & 8 Geo. V. ch. 29, enacts as follows:—

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“It shall not be lawful for,—

“(a) any Canadian company; or,

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“(b) any alien, whether a natural person or a foreign company, within Canada . . . . to carry on any business of insurance . . . . unless under a license from the Minister granted pursuant to the provisions of this Act.”

Masten, J.A.

Section 12 makes a similar provision in respect to British companies.

Section 71 (see 14 & 15 Geo. V. ch. 50, sec. 7) provides the penalty to be incurred by any Canadian company or by any alien, whether a natural person or a foreign company, who does insurance business in Canada without a license.

And sec. 71A makes a similar provision with regard to British companies and British subjects.

Section 134A (see 13 & 14 Geo. V. ch. 55, sec. 3), omitting the irrelevant subsections, is as follows:—

“134A (1) It shall be a condition of the license of every company licensed under this Act to carry on the business of automobile insurance or licensed to carry on any other class or classes of insurance which include the insurance of automobiles whether such condition be expressed in the license or not, and for the breach of which the license may be cancelled or withdrawn by the Minister, that no policy of automobile insurance other than an interim receipt or temporary binder covering a risk for a period not exceeding fourteen days shall be delivered in Canada by any such company unless the company has received an application for the policy in writing signed by the insured or by his agent authorised in writing signed by the insured, such application to contain the information and endorsements hereinafter specified: that no such policy shall be delivered in Canada by any such company until a copy of the form of such policy has been mailed by prepaid registered letter to the Superintendent; and that every such policy shall contain in substance the following terms, provisions or conditions:—

(Here follow 18 terms, provisions, and conditions.)

Characteristic examples of the conditions enacted under this section are as follows:—

“(a) the name and address of the company, the name and address of the insured, the name of the person or persons to whom the insurance money is payable if other than the insured, the premium for the insurance, the perils or risks insured against, the indemnity for which the company may become liable, the event on

App. Div. the happening of which such liability is to accrue, and the term of  
1926. the insurance."

RE " (j) if the policy insures against accident to persons or dam-  
INSURANCE age to property of others than the insured:—  
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Masten, J.A. " (i) that upon the occurrence of an accident involvinig bodily  
injuries or death, or damage to property of others, the insured shall  
promptly give written notice thereof to the company, with the  
fullest information obtainable at the time; that the insured shall  
give like notice, with full particulars of any claim made on account  
of such accident, and that every writ, letter, document or advice  
received by the insured from or on behalf of any claimant shall be  
immediately forwarded to the company.

" (ii) that the insured shall not voluntarily assume any lia-  
bility or settle any claim except at his own cost; that the insured  
shall not interfere in any negotiations for settlement or in any legal  
proceedings, but, whenever requested by the company, shall aid in  
securing information and evidence and the attendance of any wit-  
nesses, and shall co-operate with the company, except in a pecu-  
niary way, in all matters which the company deems necessary in the  
defence of any action or proceeding or in the prosecution of any  
appeal."

" 134A (2) A copy of the application for the policy shall be  
attached to and form part of the policy when issued and such appli-  
cation shall set forth the insurer's occupation or business, the  
description of the automobile insured, its purchase-price to the  
insured, whether fully paid for or otherwise, whether purchased  
new or second-hand, particulars of any mortgage, lien or other  
encumbrance, the use to which it is and will principally be put, the  
place where it is and will be principally maintained and garaged,  
the locality where it is and will be principally used, the fact of any  
accident in which an automobile owned or operated by the insured  
has been involved, the particulars of any claims made against and  
by the insured in respect of the ownership or operation of any auto-  
mobile, whether any company has cancelled any automobile policy  
of the insured, or refused to issue automobile insurance to the  
insured and such further information as the company may require.

" (3) Notwithstanding anything in this section contained, the  
policy may be renewed by the delivery of a renewal receipt or a new  
premium note.

" (4) Upon every such application there shall be printed or  
stamped in conspicuous type, not less in size than ten point, the  
following words:—

“ ‘ If the applicant knowingly misrepresents or conceals any fact or circumstances required by this application to be made known, the contract of insurance shall be void as to the property or risk undertaken in respect of which the misrepresentation or omission is made.’

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“ (5) Any such policy may provide for the exclusion from the risks insured against, of losses arising from any hazard or class of hazard expressly stated in the policy.

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“ (6) In any case where there has been imperfect compliance with a statutory condition as to the proof of the loss to be given to the insured, or as to any matter or thing to be done or omitted by the insured after the maturity of the contract, and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on any such terms as it may deem just.

“ (7) No such company shall issue in Canada a valued policy of automobile insurance.”

Section 134 provides as follows:—

“ 134. (1) It shall be a condition of the license of every company licensed under this Act to carry on the business of accident insurance or sickness insurance, or both, whether such conditions be expressed in the license or not, for the breach of which the license may be cancelled or withdrawn by the Minister. . . .

(Here follow fourteen terms and provisions relative to contracts of accident insurance and six terms and provisions relative to contracts of sickness insurance. Each and every one of these conditions is similar in character to the examples given under sec. 134A, and is directed solely to some detail of the contract of insurance.)

“ 134. (4) Any of the foregoing terms or provisions which are inconsistent with terms or provisions required to be contained in the policy by the law of the Province in which the policy is issued, shall not, to the extent to which they are so inconsistent, be required to be contained in the policy.”

It thus appears that the legislation in question is limited to three classes of persons (including companies): first, Dominion companies; second, British companies and individuals; third, foreign or alien companies and individuals. The effect of the legislation is that these persons are prohibited from carrying on in Canada the business of insurance without a license, and it is provided that it shall be a condition of such license, whether expressed on the face of it or not, that every policy issued by the licensee shall contain the statutory provisions in question, and the



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1926. any other condition.

RE  
INSURANCE The constitutional question remains the same in relation to  
CONTRACTS. each of the three classes of insurance (automobile, accident, and  
Masten, J.A. sickness); but, as applied to Dominion companies, the considera-  
tions which govern our conclusion are in some respects different  
from those which relate to the power of the Dominion to license  
British and alien persons (including companies).

Accordingly I proceed to deal first with the questions:—Does the object and purpose of this legislation relate to the incorporation of Dominion insurance companies, or is it directed to the regulation of insurance business in Ontario? And, in the alternative: Can the legislation in question be justified as ancillary to any of the enumerated powers in sec. 91?

It may be assumed that the Dominion Parliament is competent to grant to a company incorporated by it a status as a Dominion corporation, to confer upon it its capacities, to endow it with powers, and to prescribe limitations on those powers. For example, it might enact that no insurance company incorporated under its authority should possess power to carry on conjointly the business of life insurance and the business of guarantee insurance. It can prescribe the number and mode of election of its board of directors, and detail their powers; generally, it can legislate respecting the internal relations of the members or shareholders and the regulation of the domestic affairs of the company. But the granting of subjective status and powers of the company is one thing, and the regulation of the objective exercise of its powers in a particular Province is quite another thing.

It seems to me self-evident that the conditions which a Dominion company, after it has been incorporated and organised, chooses to insert in its policies of insurance have nothing whatever to do with its prior incorporation. In other words, the Dominion legislation here in question is not aimed to create or to control or limit the status, powers, or field of operation of the companies referred to in the statute, but rather to control its subsequent operations by prescribing certain minor details of the contracts into which the citizens of Ontario may enter with such companies and persons, and so to regulate the business of insurance.

Nor can the Dominion invoke the aid of enumerated head 2 of sec. 91 (Regulation of Trade and Commerce) in support of this enactment. Notwithstanding the extension of the ambit of the legislative powers of the Dominion under that head, as indicated by the decisions of the Judicial Committee in *John Deere Plow Co. Ltd. v. Wharton*, [1915] A.C. 330, *Board of Commerce* case,

[1922] 1 A.C. 191, and *Toronto Electric Commissioners v. Snider*, App. Div. 1926.  
 [1925] A.C. at p. 409, I think that the *Parsons* case, *supra*, the *Alberta* case, *supra*, and the *Reciprocal Insurers'* case, *supra*, establish firmly that the Dominion Parliament cannot, by virtue of its authority to regulate trade and commerce, pass an enactment in regulation of contracts of insurance and the business of insurance. RE INSURANCE CONTRACTS.  
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If then this legislation does not in its essence relate to the incorporation of a Dominion company and is not authorised by head 2 of sec. 91, it can be pronounced valid only if it is ancillary to legislation under one of these heads. I pause here to observe that the power of the Canadian Parliament to incorporate Dominion companies is derived from the general authority to make laws for "the peace, order, and good government of Canada," and not from any enumerated head of sec. 91. In such a case the power of the Canadian Parliament to pass legislation infringing on enumerated head 13 of sec. 92 (civil rights) will not be readily inferred. See the discussion of this point by Lord Watson in the *Liquor Prohibition Appeal, Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at pp. 359 and 360, and his conclusion at the foot of p. 360, as follows: "These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in sec. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in sec. 92."

I proceed to deal with the question whether the legislation in question is ancillary to the incorporation of Dominion companies.

In the case of *British Columbia Electric Railway Co. v. Vancouver Victoria and Eastern Railway and Navigation Co.* (1913), 48 Can. S.C.R. 98, at p. 120, Duff, J., suggests a test of what is truly ancillary which seems to me to be applicable and appropriate in the present case. He says: "In every case in which a conflict does arise the point for determination must be whether there exists such a necessity for the power to pass the particular enactment in question as essential to the effective exercise of the Dominion authority as to justify the inference that the power has been conferred;" citing *City of Montreal v. Montreal Street Railway Co.*, [1912] A.C. 333, at pp. 342-345.

It follows that the answer to the question when and to what extent the Dominion Parliament can by legislation ancillary to its powers under sec. 91 intrude on the domain of civil rights depends on the surrounding circumstances. The principle is readily stated—the difficulty is in applying it to the facts of each particular case.

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Reported cases are of value only so far as they explain and elaborate the principle and afford examples and illustrations of the way in which that principle has been applied in particular cases by eminent Judges, and to that end I refer to a few only of the many cases in which the question has arisen:—

In *Cushing v. Dupuy* (1880), 5 App. Cas. 409, the Dominion Parliament had passed legislation enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, so that no appeal to the Privy Council lay as of right. The legislation was held to be competent as a general law relating to bankruptcy, though affecting a civil right, because procedure must necessarily form an essential part of any law dealing with insolvency.

In the *Parsons* case, *supra*, one company was incorporated by the Dominion and the other by the Imperial Parliament, and the argument for the Dominion was that the Dominion Act 38 Vict. ch. 30 had imposed certain conditions on companies of this kind upon the performance of which the right to carry on business resulted and which therefore could not afterwards be hampered or restricted, however locally, by a provincial legislature.

In dealing with this argument their Lordships of the Judicial Committee (7 App. Cas. at p. 113) say:—

“It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single Province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 13 of sec. 92.”

The essential quality of such legislation is described in the *Liquor Prohibition Appeal*, [1896] A.C. at pp. 364, 365, as “necessarily essential.”

The case of *Toronto Corporation v. Canadian Pacific Railway Co.*, [1908] A.C. 54, at p. 58, indicates that the power in such circumstances does not extend further than is reasonably necessary to enable the Dominion Parliament to legislate effectively on the enumerated subjects committed to its jurisdiction by the British North America Act. In that case Toronto was ordered by the Dominion Railway Commission to pay a certain proportion of the expense of maintaining gates and guards at a point in the city where the Canadian Pacific Railway crossed a highway at the level. The Dominion Railway Act authorised the Railway Committee of the Privy Council of Canada to assess a proportion of the cost



against the municipal corporation. The city corporation contended that it was *ultra vires* the Dominion to enact legislation under which they could be charged for work either for a railway or a municipal purpose. For the railway company it was contended that the provisions in question were *intra vires* of the Dominion Parliament as being ancillary to through railway legislation, notwithstanding that they affected civil rights. Lord Collins, in delivering the judgment of the Judicial Committee, said (p. 58) :—

“If the precautions ordered are *reasonably necessary*, it is obvious that they must be paid for, and in the view of their Lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the persons interested.”

In *City of Montreal v. Montreal Street Railway*, [1912] A.C. 333, at p. 344, their Lordships say that “the Act and Order” (of the Railway Commissioners) “if justified at all must be justified on the ground that they are necessarily incidental to the exercise by the Dominion Parliament of the powers conferred upon it by the enumerated heads of sec. 91;” and (pp. 344, 35) it must be shewn that “it is necessarily incidental to the exercise of control over the traffic of a federal railway, in respect of its giving an unjust preference to certain classes of its passengers or otherwise, that it should also have power to exercise control over the ‘through’ traffic of such a purely local thing as a provincial railway properly so called, if only it be connected with a federal railway.”

It was held that such power was not “necessarily incidental.”

In the latest decision of the Supreme Court of Canada, *Rex v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, the question was on the power of the Dominion Parliament, as a part of an Act to control and regulate the trade in grain, to enact that if at the end of any crop year, in any terminal elevator, “the total surplus of grain is found in excess of one-quarter of one per cent. of the gross amount of the grain received in the elevator during the crop year,” such surplus shall be sold for the benefit of the Board.

This provision was by a majority of the Court held to be *ultra vires* as an infringement on the civil rights entrusted to provincial legislatures and not *necessarily incidental* to the control of the grain trade.

In the light of these cases, applying the test suggested by Duff, J., and quoted above, the point for determination is, whether, in the incorporation of Dominion insurance companies, there exists such a necessity for the power to prescribe the statutory conditions in question, as essential to the effective exercise of the Dominion

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CONTRACTS. incorporating insurance companies. But further, even if such con-  
Masten, J.A. ditions were essential, the need is satisfied by Provincial legislation,  
so that no necessity for such Dominion legislation now exists. Even  
assuming that formerly the nature of the business necessitated such  
legislation, the authority for legislation, ancillary to the incorpora-  
tion of Dominion insurance companies, could not have been shewn  
to exist unless and until the Provincial Legislatures failed to exer-  
cise their own legislative powers to fill the need. That they would  
so fail is not to be assumed: *City of Montreal v. Montreal Street  
Railway*, [1912] A.C. at p. 345. I therefore arrive at the conclu-  
sion that the legislation in question is not necessarily incidental to  
the incorporation of Dominion insurance companies.

With respect to British insurance companies, British natural  
persons, alien insurance companies, and alien persons, seeking to  
carry on the business of insurance in Canada, the considerations to  
be observed in reaching a conclusion are for the most part similar  
to those which obtain in considering the case of Dominion com-  
panies, and need not be repeated. Some further points, however,  
present themselves in that connection. The decision of the Judi-  
cial Committee in the case of *Attorney-General for Canada v.  
Attorney-General for Alberta*, *supra*, determines that the power of  
restricting in Canada, by a system of licensing, the business of  
foreign insurance companies, is given to the Dominion by the heads  
in sec. 91 which refer to the regulation of trade and commerce and  
to aliens.

It may, therefore, be assumed that if a foreign insurance com-  
pany, empowered by its constating instruments to carry on the  
business of both life and guarantee insurance, were to apply for a  
Dominion license to carry on its business in Canada, the Dominion  
Parliament might permit it to carry on life insurance and decline  
permission to carry on concurrently guarantee insurance, or might  
impose a condition that it deposit so many thousands of dollars  
with the Insurance Department of Canada as a guarantee to its  
policy-holders. It may also be assumed that any alien, whether a  
foreign company or a natural person, coming to Canada to carry  
on the business of insurance, must be licensed by Dominion auth-  
ority, and only to the extent to which such alien is so licensed and  
on the conditions prescribed by the Dominion will he or it be legally  
entitled to commence business; but, when the alien has complied  
with the conditions prescribed and the license issues, the functions

of the Dominion authority are exhausted, and the details of the contracts of insurance which it subsequently makes with the citizens of Ontario does not fall under the head of licensing (though it may be a consequence of the licensing) but under the head of civil rights in whatever Province the licensee carries on business.

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The view just expressed accords with the decision of the Judicial Committee in the case of *Cunningham v. Tomey Homma*, [1903] A.C. 151, and an observation of Lord Halsbury in delivering the judgment of the Committee is pertinent to the present question. The subject there under consideration related to the validity of an Act of the Legislature of British Columbia excluding all Japanese, whether naturalized or not, from exercising the franchise at provincial elections. The contention of the Dominion was that the British Columbia Act was *ultra vires* because it trenched on the exclusive authority of the Dominion Parliament to legislate respecting aliens and naturalization. At pp. 156, 157, Lord Halsbury, in discussing sec. 91, head 25, says:—

“The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where those depend upon residence, are quite independent of nationality.”

In the result the Judicial Committee negatived the contention of the Dominion.

Nor, in my opinion, is this enactment “ancillary,” in the sense of “necessarily essential,” to Dominion legislation respecting aliens or trade and commerce.

The fact that automobile insurance in all its branches and the business of accident and sickness insurance were carried on fairly to the public and with success to the companies for many years before statutory conditions were prescribed by any authority, federal or provincial, seems to establish conclusively that statutory conditions are not “necessarily essential” to the conduct of such insurance business. The conditions seem in the main to be devised rather for the purpose of affording adequate protection to the insured than to facilitate the fulfilment by the company of its functions, and are in no sense essential to the exercise by the insurance company of its powers. The same reasoning applies, I think,

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Masten, J.A. With respect to questions 2 and 3 there is, however, suggested a further question which may be stated as follows:—The Dominion Parliament has power to prohibit the entry into Canada for insurance purposes of British companies and persons and alien companies and persons unless and until they secure from the Dominion a license so to do. It follows that it may condition its grant of a license on any terms whatsoever which it may see fit to impose and revoke the license on breach of a condition on which it was granted. The applicant is under no compulsion to accept the license on the terms prescribed. He may refuse and stay out of Canada, but if he accepts the license on the conditions and terms prescribed by the Dominion, he is bound by such acceptance, and the incorporation of the Dominion statutory conditions in the policies he issues arises from such acceptance and are not imposed by the Dominion statute. Hence it is argued that the legislation in question does not trench on civil rights in Ontario but is directed solely to legislation respecting British and alien persons (including companies) and the conditions of their entry into Canada, and that consequently the discretion of the Dominion regarding the conditions it chooses to impose on applicants for licenses cannot be in any way questioned or controlled.

I agree, subject to one exception, viz., that where the condition sought to be imposed by the Dominion has the effect of trenching on any of the enumerated powers which are exclusively entrusted to the Provincial Legislature by sec. 92, the right to impose and enforce such a legislative condition must as to its constitutional validity be considered and tested by the same principles as those which are applicable to direct legislation, for it is well established that the Dominion Parliament cannot do indirectly what it cannot do directly.

Considering the history of the constitutional controversy between the Dominion and Provincial authorities respecting insurance legislation, I am driven to the conclusion that the legislation in question is an attempt by this indirect method to regulate the business of insurance in the Provinces of Canada so far as it is conducted by the classes of companies and persons above named, and that its form is adopted under the guise of legislation respecting trade and commerce and respecting aliens in order to cloak a regulation of the business of insurance.

“A statute must be judged by its natural and reasonable effect.” This statement was made by the Supreme Court of the United States in adjudicating upon the constitutionality of an Act of Con-

gress and is reported in *Hammer v. Dagenhart* (1918), 247 U.S. 251, 275. It is quoted with approval in the judgment of the Judicial Committee in the case respecting *Reciprocal Insurers*, [1924] A.C. at p. 339.

Now the natural and reasonable effect of the legislation in question is to deprive the citizens of Ontario of the civil rights which they previously enjoyed.

Apart from such legislation as is here in question, any insurance company, foreign or domestic, and any natural person (not an enemy), might under the rules of comity enter Canada and carry on the business of insurance. Apart from this legislation, the citizens of Ontario could contract with British and with alien insurance companies without let or hindrance, and their contracts would be valid and enforceable in accordance with the statutory conditions prescribed by Ontario law. But if and so far as the legislation in question has validity, the citizens of Ontario cannot any longer contract insurance with British or alien companies on the conditions and terms prescribed by the laws of Ontario, but only on the terms prescribed by this legislation. Thus the natural and reasonable effect of the legislation in question is to interfere with civil rights of the citizens of Ontario.

I, therefore, conclude that the legislation in question is, not only in substance but also in form, directed to the regulation of the conduct in Ontario of the business of insurance, and that in its object and scope it fails to come within any power or combination of powers confided to the Dominion Parliament by sec. 91.

For these reasons I am of opinion that the legislation in question is not properly framed so as to come within the competence of the Dominion Parliament.

I would answer the first question "Yes" and the second and third questions "No."

MIDDLETON, J.A.:—I concur.

RIDDELL, J.A.:—While I am not wholly free from doubt, the inclination of my opinion is to agree with my brother Masten. In view of the probability that the case will go further, I do not think I should be justified in holding up the judgment in the expectation of increasing or wholly removing my doubt. I concur.

LATCHFORD, C.J.:—I have had the advantage of perusing the opinion written in this case by my learned brother Masten, and desire to express my concurrence in his answer to the first question. The *Parsons* case seems to me conclusive on this point.

The second and third questions are not so easily answered.

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Counsel for the Province of Ontario contend that, if the answer to the first question is in the affirmative, sec. 134 of the Dominion Insurance Act of 1917, and sec. 134A, as enacted in 1923, are *ultra vires* of the Parliament of Canada.

These sections are sufficiently quoted in the opinion of my learned brother, and it is unnecessary to repeat them. They purport to affect certain companies licensed or seeking a license under sec. 4 of the Act of 1917, which empowers the Minister to grant a license to any company which shall have complied with the requirements of the Act, which include *inter alia* conditions to be inserted in the policies differing in certain respects from conditions imposed by the Ontario Insurance Act. They do not affect the business of insurance carried on in Ontario or any particular Province by other than such licensees. The companies affected are any Canadian company or any foreign company intending to carry on the business of insurance throughout Canada, or in any part of Canada, which may be specified in the license and any other company carrying on such business throughout Canada or in more than one Province. British companies can stand in no higher position than "foreign" companies with regard to licensing.

For nonconformity with the conditions so imposed a Dominion license may be withheld by the Minister, or, if issued, withdrawn or cancelled.

Section 69 of the Ontario Insurance Act, R.S.O. 1914, ch. 183, provides for the registration under that Act of a company so licensed and for the suspension or cancellation of the registry of a company, the license of which has been suspended or cancelled under the provisions of the Dominion Insurance Act.

The power of the Canadian Parliament to enact laws for the incorporation of companies to carry on the business of insurance in more than one Province of the Dominion, and for the licensing of such companies and of British and foreign companies and persons, is not, in my opinion, open to question. Each Province has the exclusive power, under head 11 of sec. 92 of the British North America Act, to make laws in relation to the incorporation of "companies with Provincial objects."

"It follows," said Sir Montague Smith in the *Parsons* case, 7 App. Cas. at p. 117, "that the incorporation of companies for objects other than Provincial falls within the general powers of the Parliament of Canada." The *John Deere Plow Co.* case, [1915] A.C. 330, also determines that the power of legislating with reference to the incorporation of companies with other than Provincial objects belongs exclusively to the Dominion, as a matter "not coming exclusively within the classes of subjects assigned to the

Legislatures of the Provinces." The Board at the same time was careful to declare that because the status of a Dominion company confers on it civil rights to some extent, the power does not enable it to trench on the exclusive jurisdiction of the Provincial Legislature for civil rights *in general*. The expression "civil rights" must be construed consistently with various powers conferred by secs. 91 and 92 which restrict its literal scope.

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The Province of British Columbia was declared in that case incompetent to "legislate so as to deprive a Dominion company of its status and powers:" *per* Haldane, L.C., at p. 341. In so far as the status and corporate capacity of a Dominion company carries with it powers conferred by the Parliament of Canada to do business in every part of the Dominion, the Provincial Legislature cannot interfere.

This decision is far-reaching in its consequences. As I understand it, while the Dominion cannot interfere *generally* with civil rights, it may do so in particular cases.

In *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91, the implications in the *John Deere Plow Co.* case were invoked to determine that a Provincial Legislature cannot validly enact sections which would sterilise and destroy the capacities and powers validly conferred by the Dominion Parliament.

In *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] A.C. 588, it was held to be competent for the Parliament of Canada, under sec. 91, heads 2 and 25, to prohibit, by legislation properly framed, a foreign insurance company from carrying on business even in a single Province of Canada without a license from the Minister in charge of the Department of Insurance.

In *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328, at p. 347, their Lordships, while declining to express an opinion on the competency of the Dominion Parliament to legislate by virtue of its authority in relation to aliens and to trade and commerce, "recalls" the observation of Lord Haldane in *Attorney-General for Canada v. Attorney-General for Alberta*, *supra*, "to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed," might be competently enacted by Parliament (an observation which, it may be added, applies also to Dominion companies). No dissent is expressed from the observation so recalled, though the Board refrained from giving its opinion on the point. The statement of Lord Haldane, even if *obiter*, is of great weight, and must, in my opinion, be regarded as expressing the law.

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The legislation requiring Dominion corporations and aliens, whether persons or corporations, intending to do business in more than one Province, to become licensed, was, I think, properly framed and within the competence of the Dominion Parliament. It is not general in its application but is confined—sec. 11—to “any Canadian company, or any alien, whether a natural person or a foreign company.”

As the Parliament of Canada has the power to create corporations with other than Provincial objects and possesses also the power of licensing such corporations and aliens and foreign persons for the purpose of doing business in Canada, it seems to me to follow as necessarily ancillary to the exercise of such a power that the Dominion could validly prescribe the conditions under which that particular business should be carried on. I am not deterred from this conclusion by a full realisation of the principles laid down recently in the Privy Council by Duff, J., when he said that the true nature of an enactment in question must be considered, its pith and character, and its substance, rather than its form. It is obviously desirable that all persons or companies authorised to carry on the business of insurance under the Insurance Act of 1917 should conform to identical conditions, and that is in substance and effect what the legislation now in question purports to require.

I therefore think questions 2 and 3 should be answered in the affirmative.

SMITH, J.A.:—I agree with my brother Masten in answering the first question in the affirmative, for the reasons stated by him.

As to the remaining questions, while I am in general agreement with my brother Masten, I am of opinion that, as to natural persons and companies that the Dominion Parliament has authority to prohibit from carrying on business without a license, the Parliament has the power to grant and revoke such license on any condition it sees fit to impose, and therefore has power to enact that there shall be conditions as provided in sec. 134, subsecs. 1, 2, 3, 4. If the form of policy submitted does not conform to the requirements, there would be the right to refuse a license. If after the issue of the license the licensee refuses or neglects to comply with the requirements by putting the stipulated terms and conditions in its policies the license may be cancelled. As to this I am at variance with my brother Masten where he says that “when the alien has complied with the conditions prescribed and the license issues, the functions of the Dominion authority are exhausted.” In my view the license may be for a limited time and renewable and



may be made revocable on failure to comply with certain conditions.

Complying with the conditions by the licensee is not an interference with civil rights, because, when these terms and provisions are inserted in a policy, they affect civil rights not by virtue of the Dominion Act but by virtue of their having become part of the contract between the parties. Any Province may enact that all or part of such terms and conditions shall have no effect within the Province. They have effect on civil rights within each Province as terms of the contract only to the extent to which they are not in conflict with the law of the Province. Subsection 4 of sec. 134 so provides, though in my view this would be the case without this subsection.

I would therefore, to the extent indicated, answer questions 2 and 3 in the affirmative.

*Questions answered as stated by MASTEN, J.A. (LATCHFORD, C.J., and SMITH, J.A., dissenting in part).*

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[APPELLATE DIVISION.]

RE LENNOX AND TORONTO BOARD OF EDUCATION.

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Feb. 19.

*Expropriation of Land—School Sites Act, R. S. O. 1914, ch. 277—Compensation—Award of Majority of three Arbitrators—Variation by County Court Judge on Appeal—Further Appeal (by Leave)—Evidence—Testimony of Experts as to Value—"Averaging of Witnesses"—"Allowance for Disturbance"—Quantum—Principle of Valuation—Application to Facts of Case—"Replacement Value"—"Special Adaptability"—Evidence as to Prices in Neighbourhood.*

Under the School Sites Act, R. S. O. 1914, ch. 277, the land in a city upon which six dwelling-houses stood was expropriated by the Board of Education of the City. Three arbitrators were appointed under the Act to determine the value of the property taken. The majority awarded \$22,260; the third arbitrator was of opinion that the amount should be \$29,700. Upon appeal from the award, the County Court Judge increased the amount awarded to \$27,060.

Upon a further appeal (by leave of a Judge of the Supreme Court of Ontario), the Court adopted the rule laid down by the Privy Council in *Fraser v. City of Fraserville* (1917), 33 Times L. R. 179, that "the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired."

Where the evidence of expert witnesses as to value is conflicting, neither the arbitrators nor the Court should endeavour to arrive at the true result by "averaging of witnesses" or "splitting the difference."

*Munsie v. Lindsay* (1886), 11 O. R. 520, explained.

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There is no foundation for the view that the "allowance for disturbance" usually added in awards to the value found is arbitrarily fixed at 10 per cent.: in this case it was *held*, that 6 per cent., which was allowed by the majority award, was ample.

The majority of the Court upheld the order of the County Court Judge, subject to a variation of the allowance for disturbance, though not agreeing with his reasons.

MIDDLETON, J.A., differed from the majority as to the application of the rule laid down, and was of opinion that the award of the majority of the arbitrators should be restored.

Questions as to "replacement value," "special adaptability," and evidence of prices paid for neighbouring lands, discussed.

APPEAL by the Board (by leave of WRIGHT, J.) from an order made by COATSWORTH, Co. C.J., on the 10th September, 1925, allowing an appeal by the claimant from a majority award of arbitrators appointed to determine the value of six houses of the claimant in Waterloo street, Toronto, expropriated by the Board under the provisions of the School Sites Act, R.S.O. 1914, ch. 277, and amending the award by increasing the amount awarded from \$22,260 to \$27,060, with costs of arbitration and appeal.

December 14, 1925. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

*E. P. Brown*, K.C., for the appellant Board, argued that the County Court Judge had erred in increasing the award from \$22,260 to \$27,060; the evidence did not warrant the increase. He also urged that the principle adopted was wrong. The market value of the land was what should be allowed. This had been defined in *Rex v. Macpherson* (1914), 15 Can. Ex. C.R. 215. The best evidence of value was the price obtained in the open market for property in the vicinity where the vendor was not compelled to sell and the purchaser not bound to buy: *Re National Trust Co. and Canadian Pacific Railway Co.* (1913), 29 O.L.R. 462. Replacement less depreciation was an incorrect method of arriving at value: *Rex v. Manuel* (1915), 15 Can. Ex. C.R. 381. The 10 per cent. allowance for disturbance and inconvenience was excessive; 6 per cent. would have been generous: *Re Watson and City of Toronto* (1916), 38 O.L.R. 103; *Rex v. Larivée* (1918), 42 D.L.R. 151. On the question of potential value, counsel submitted that the evidence shewed that the houses were poor material to convert into duplex houses. He referred on this point to Halsbury's Laws of England, vol. 6, paras. 40 and 41. Counsel also contended that the "averaging of witnesses" was a wrong practice, and had not been laid down as a principle in *Munsie v. Lindsay* (1886), 11 O.R. 520. See *Grand Trunk Railway Co. v. Coupal* (1898), 28 Can. S.C.R. 531.

*J. R. L. Starr*, K.C., for the claimant, respondent, contended that the amount awarded was not sufficient; the assessment made by the dissenting arbitrator was a just one. The proper basis of compensation was the value to the owner of the land with all its potentialities, not merely its market value: *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569, at p. 576; *Fraser v. City of Fraserville* (1917), 33 Times L.R. 179. The principle upon which *Munsie v. Lindsay* was decided was sound. The evidence of two of the witnesses here was purely opinion-evidence. As to the value of expert evidence without the knowledge of actual sales, counsel referred to *Re Macpherson and City of Toronto* (1895), 26 O.R. 558; *In re Small and St. Lawrence Foundry Co.* (1896), 23 A.R. 543; *Dodge v. The King* (1906), 38 Can. S.C.R. 149. The replacement value was only an element. The potential value was an important element to consider: *Re Macpherson and City of Toronto*.

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February 19, 1926. RIDDELL, J.A.:—This case illustrates how a method intended to prevent litigation and save costs may result in both to an unusual extent.

The Board of Education wished to expropriate certain property; the value was left to be determined by two County Court Judges and a prominent barrister; they differed; the majority award was appealed to the Senior County Court Judge, who increased the award; the Board applied for and obtained from a Justice of the Supreme Court leave to appeal; and now the appeal comes on before us.

I have been much troubled over the case; but, having read more than once all the evidence and reasons for judgment, I do not think that further consideration will modify the view I have formed.

It must be borne in mind that the appeal is from the adjudication of his Honour Judge Coatsworth, and that the appeal can succeed only if and so far as we can clearly see that he is wrong—to doubt is to affirm.

The amount allowed by his Honour is \$27,060, the majority of the arbitrators allowed \$22,260, the minority \$29,700.

On the argument the Court repudiated the construction put on the language of the late Chancellor in *Munsie v. Lindsay*, 11 O.R. 520, as justifying an "averaging of witnesses." The Chancellor states as a conclusion from experience what probably every one accustomed to courts or to business will agree to: "It is not as a general thing the best rule in cases of varying opinion as to value to reject one set of witnesses *in toto* and to adopt the figures of an

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opposing set. One might rather suspect that neither was exactly to be followed, and that truth lay somewhere between the extremes."

Every one at all accustomed to practical affairs knows that the question of value is a most perplexing one, giving rise to many and varying opinions—the optimist and the pessimist, he who has land to sell and he who must buy, one with pleasant associations and one with unpleasant—all equally honest and equally competent—will or may widely differ. The rule of practical wisdom, *in medio tutissimus ibis*, is as old as the hills, at least as humanity, but it is no more a rule of law than the Proverbs of Solomon.

The rule suggested would give the verdict to him who hired the most and the biggest liars.

The only rule to follow is that laid down by trial Judges to juries every day—pay attention to every witness, gauge as well as you can his honesty and capacity, give such effect as you think it deserves to what he says, weigh all the evidence which you believe, and come to the best conclusion you can. *Ponderantur non numerantur*.

Most so-called rules for determining value, again, are simply rules of practical wisdom, not rules of law.

The political economist's jingle,

"The real worth of any thing

"Is just as much as it will bring,"

sounds well—in matters of ordinary trade and commerce it is true or substantially true—but, in the ultimate analysis, it is but a definition of worth in Political Economy or with some political economists.

But a piece of real estate may be almost unsaleable for want of buyers or other reason and still be worth much.

Replacement value may be a fair test in some cases; but most of us know of land whose value has not been increased correspondingly or at all by buildings placed thereon—some of us know what, indeed, is common knowledge, that land may be and has been diminished in value by buildings.

What must in general be considered is, as has been authoritatively laid down, "the value . . . to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired:" *Fraser v. City of Fraserville*, 33 Times L.R. 179, quoted by Duff, J., in *Toronto Suburban Railway Co. v. Everson* (1917), 54 Can. S.C.R. 395, at p. 401. "All poten-

tialities must be considered and all contingencies must be taken into account." *Re Macpherson and City of Toronto*, 26 O.R. 558, 565; *Re Hannah and Campbellford Lake Ontario and Western Railway Co.* (1915), 34 O.L.R. 615, at p. 618.

At the conclusion of the argument I was satisfied that the reasons advanced by his Honour Judge Coatsworth could not be supported, but a careful examination of the evidence fails to convince me that he was wrong in his estimate except in a minor point. *Cessante ratiōne cessat ipsa lex*, it has been said; but never, *Cessante ratiōne cessat ipsum judicium*; it is trite law that an appeal is an appeal from the judgment, not from the reasons given therefor.

Except on the "allowance for disturbance" I am unable to say that the learned County Court Judge was wrong. He seems to think that an arbitrary 10 per cent. has been fixed, and that that amount must be allowed as a matter of law—there is no foundation for such a view. Had he not so supposed, there is no reason why he should have raised the percentage beyond the rate allowed by the majority of the arbitrators. I think that allowance should be reduced to 6 per cent.

The award should be made: simple compensation, \$24,600; compensation for disturbance, \$1,476—total \$26,076.

There should, I think, be no costs of this appeal, as the appellant, while succeeding in reducing the amount allowed by the County Court Judge by a comparatively large sum, failed in its attempt to reduce it by one much larger. Costs below as in the judgment appealed from.

LATCHFORD, C.J.:—With some doubt, I agree.

MASTEN, J.A.:—The real dispute in this case falls within narrow limits. It relates to the compensation which the claimant is entitled to recover for a row of six small houses in Waterloo avenue, Toronto, expropriated by the Toronto School Board. The majority of the arbitrators awarded the claimant \$22,260. On appeal Judge Coatsworth increased this to \$27,060. The difference is \$4,800. The appellant asks that the original award be restored. The first observation that presents itself to me is this. In a case where the highest valuation in evidence was as much as \$40,000 and the lowest was under \$20,000, where it is a question of quantum only, and where two tribunals below have guessed within \$4,800 of each other, ought this Court to interfere on questions of fact only unless there has been misapplication of the law to the facts of this particular case?

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The principles of law applicable to compensation are well settled, and I know of no more satisfactory and comprehensive statement than that quoted by my brother Middleton from the case of *Fraser v. City of Fraserville*, 33 Times L.R. 179: "The value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired." Not only on this point, but generally, I am not conscious of differing from my brother's statement of the principles of law applicable to the fixing of compensation. The difference between us lies, not in the statement of the general principles, but in their application to the particular circumstances of this case, and it is in that respect that in my opinion the majority of the arbitration board erred.

I think that the judgment of Judge Coatsworth is right, not on the basis of the rule quoted by him from the judgment of the Chancellor in *Munsie v. Lindsay* (though that rule, as pointed out by Mr. Starr in his argument, may sometimes afford a practical working method when dealing with unsupported opinion-evidence of experts), but because I think that the majority of the arbitrators failed to give proper effect and adequate weight to two of the elements which ought to be considered in this case, and because I think on the other hand that Judge Morson laid undue stress upon the reconstruction view, which, I think, does not apply.

(2) The market price which a willing purchaser would pay a willing vendor for the property is frequently the most important element to be considered in arriving at a conclusion, but it is to be supplemented by this corollary, that the selling value of other properties frequently affords a fallacious measure of the compensation to be awarded. You cannot have a market price without a market. If you had a market for real estate similar to the Winnipeg and Chicago wheat markets, the market price so ascertained would be conclusive, but the variant that enters into this class of evidence is "the extent and character of the market." To illustrate—A., living in a small town or village, owns a fine large residence where he lives and which has been fitted up by him so as to be suitable to his requirements, and he desires to live there for the balance of his days. It is expropriated. In evidence it is shewn that there is a neighbouring residence formerly owned by B., who died or became bankrupt, that B.'s property, after every effort, was sold for the best price obtainable; but, there being almost no one who wanted such a property in that town, the price obtained was ridiculously low.

Such a sale does not establish a market price, for there was no real market, and affords no assistance in measuring the compensation to which A. is entitled; for his property is really of a value to him in proportion to what it would cost him to reconstruct.

Another example of this kind was mentioned by Mr. Brown in his argument, where he pointed out that the price which the School Board paid for adjoining properties in order to avoid the expense of arbitration might well be greater than the real value and was not a fair measure of the compensation.

Such evidence is of course admissible and relevant, but the weight to be attached to it depends on all the surrounding circumstances; and, unless these are fully disclosed, the evidentiary value of the fact is weakened. In many cases evidence of the surrounding circumstances may not be readily available. One vendor's wife may have taken a dislike to the neighbourhood and compelled her husband to sell their residence cheap, or a purchaser's wife may have taken a fancy to a particular house and induced her husband to buy at a fancy price. Notwithstanding the immense bulk of evidence laid before us in this case, we have few details of the circumstances surrounding the purchase and sale of the different properties brought before the Board in evidence. So that in this particular case the evidence afforded by neighbouring sales does not possess such an overriding and compelling quality as it would possess in the case of vacant land for which there was an active market.

Apart from this consideration, I think that the evidence as adduced by the claimant of other purchases by the School Board was admissible on an arbitration, and that on this branch the evidence pro and con fairly balances.

(3) In every case where property is compulsorily taken, the owner is entitled to every element of value arising from any use to which he could reasonably and profitably put his property. This is not identical with "special adaptability," and that term is not, I think, applicable in its true sense to the circumstances of this case. After consideration of the evidence, it appears to me that this property can reasonably be put to a more profitable use than that in which it stands at the present time, by completing the scheme upon which Lennox entered some years ago of dividing it into duplex apartments.

I am led to this view by the following considerations: first, by the expenditures already made towards duplex apartments; second, by the fact that this group of houses is located contiguously to a manufacturing district where small apartments are in demand; and also by the fact that Mr. Lennox, as an experienced architect,

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could complete the necessary changes in such a group of houses with far less expense and trouble than could one who was not an expert of experience in construction and alteration of buildings. It would be a very different matter for a workman who owned one house to turn it into a duplex.

I have not overlooked the circumstance that the importance of this feature is lessened by the fact that for 10 years Mr. Lennox has failed to complete the plan begun in 1914; nevertheless I think it a factor which the majority of the Board improperly disregarded *in toto*.

Mr. Starr points out in his argument that the total rental of these houses for the years 1923, 1924, and 1925 was \$1,824, that the tenants did the repairs, and that the taxes and insurance amounted to \$293, thus leaving a net return of \$1,531, which, capitalised at 6 per cent., would amount roughly to \$25,000 as the value of the property. Now, while it is true that the houses under existing conditions will depreciate more or less from year to year, yet in a location such as this in a growing city with developing manufactures in that neighbourhood the claimant may well think that the increase in value of property will more than offset any depreciation in the houses, and will be content with these investments, hoping for a possible rise in that way. Being deprived of that chance, some consideration should be given to it. That was the view adopted by this Court in the case of *Re Dixon and City of Toronto* (1924), 56 O.L.R. 167, at p. 174, and is, I think, an element in the nature of potential value proper to have been considered in the present case for what it is worth.

I think that "reconstruction value" is not a term which is applicable to the circumstances of the present case, but it is undoubtedly the fact that the cost of building in 1924 was much greater than the cost of building in 1914, when these properties were put into their present condition, and that the increased value of the buildings from that standpoint is a legitimate element for consideration, and is one which, I think, has been largely ignored by the majority of the original arbitrators.

With respect to the allowance by Judge Coatsworth of 10 per cent. for disturbance and inconvenience, I am of opinion that there is no cast-iron rule fixing it at 10 per cent. It must and should vary with the circumstances of every case; the amount to be allowed was discretionary with the arbitrators and ought not to have been interfered with. I would therefore restore the 6 per cent. allowed by the award in place of the 10 per cent. allowed by Judge Coatsworth.

For these reasons, I am of the view that there was error in the application of the law to the facts on the part of the original arbitrators and that the majority failed to award adequate compensation, also that Judge Morson, by giving undue weight to the first point mentioned in his reasons, probably gave too much, and therefore I think the view that the judgment of Judge Coatsworth, which is the real judgment that is in appeal before this Court, ought not to be disturbed, except by restoring the allowance for disturbance fixed by the majority of the Board, that is, reducing the 10 per cent. allowed by Judge Coatsworth to 6 per cent. I would therefore affirm Judge Coatsworth's order in so far as it fixes the compensation at \$24,600 and awards costs to the claimant, and would fix the allowance for disturbance, etc., at \$1,476, making a total of \$26,076.

With respect to the costs of this appeal, I concur with the disposition proposed by my brother Riddell, viz., no costs to either party.

MIDDLETON, J.A.:—An appeal by the Board of Education, by leave of Mr. Justice Wright, from an order of Judge Coatsworth, varying the award of the majority of arbitrators appointed to determine the value of certain land taken under the provisions of the Schools Sites Act, R.S.O. 1914, ch. 277.

The Board of Education sought to expropriate six houses in Waterloo avenue, Toronto, for school purposes. The six houses form part of a row of similar houses and were erected upon a piece of land having a frontage of 100 ft. 6 in. by a depth of 120 ft. to a lane.

The arbitration took place before a board constituted under the provisions of the statute, consisting of Mr. W. D. McPherson, K.C., appointed by the Board of Education, his Honour Judge Morson, appointed by the landowner, and his Honour Judge Widdifield, chosen as the third arbitrator.

The proceedings before the arbitrators cover 678 pages of type-writing and resulted in discordant views. The majority award was made by Judge Widdifield and Mr. McPherson, who agreed in placing the value of the property taken at \$22,260. No costs of the arbitration are given, but each party is to pay one-half of the arbitrators' fees (\$2,250) and one-half of the costs of the stenographer (\$103). Judge Morson dissented, and would have allowed \$29,700.

By the singular provisions of the statute in question, an appeal lay from this board to the Senior County Court Judge, although the board consisted of two County Court Judges having co-ordinate

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jurisdiction and a lawyer of very large experience. Upon this appeal his Honour Judge Coatsworth varied the award by increasing it to \$27,060, and by giving to the claimant all the costs of the arbitration and the appeal.

By sec. 20 of the statute in question, the decision of the County Court Judge is final unless special leave to appeal therefrom is given by a Judge of the Supreme Court, when an appeal will lie to a Divisional Court, whose decision is final. Under this statute, Mr. Justice Wright has given leave to appeal.

The houses in question were built many years ago. They are small, rough-cast structures, two storeys high. On the ground-floor there is a living room, a dining room, and a kitchen, with a small hall leading from the front door to a staircase to the upper flat and affording access to the living room and dining room, access to the kitchen being attained only through the dining room. Upon the upper floor are three bedrooms, a bath-room, and a very small room over the hall (from the scale I make it 6' by 8'), and one clothes-closet in the hall. These houses were upon the property when it was purchased by the claimant in 1895.

In 1914, the houses, as I think the evidence shews, were in a condition of considerable want of repair, and they were then largely rejuvenated. The cellar was excavated, and a brick wall to the cellar was constructed; new sills were put under the houses, the old sills, which had merely rested on posts in the ground, being then decayed, and other substantial repairs and alterations were made; a water-closet was then put in, and pipes and connections were put in for a wash-basin when a bath-tub was installed. A hot air furnace was then put in each house, and new eaves troughing and other necessary repair work was done. From that time on to the time of the expropriation the houses were rented at about \$25 per month, and they seem to have been steadily occupied, but no repairs of any account were made—the tenants attending to such minor things as they found necessary for the comfortable enjoyment of the houses.

The arbitrators making the majority award, in addition to the formal award, gave extensive and carefully prepared reasons shewing how they had arrived at the sum given. They stated that before them the owner based her claim for compensation on three grounds: (1) on a reinstatement basis, (2) on the market value of the premises, (3) on the market value plus the potential value in view of the possibility of converting the houses into duplex houses. These arbitrators reject the reinstatement cost as being entirely inapplicable, and state that the best guide is the selling value of similar property in the neighbourhood. The

arbitrators then discuss the evidence at some length and state that the result of their view of the premises leads them to accept the evidence of Mr. Gordon, an experienced architect, of Mr. Ponton, a real estate valuator, and other witnesses, shewing that at the time of the expropriation the houses were run down and in poor condition, indicating the need of extensive repairs, and pointing to the fact that nothing had really been done to them for 10 years or more, also that the absence of the bath, wash-basin, and other obvious deficiencies, and the cracked brick-work and decayed shingles, shewed that the houses were not precisely the valuable property portrayed by the claimant. They then examine in detail the sales of other properties in the neighbourhood, and gather such light as they can from these transactions as indicating the real value of the houses in question, and, taking everything into consideration, conclude that these houses—including the land—should be valued at \$3,500 each, and to this they add 6 per cent. as compensation for the inconvenience and loss that would arise in connection with re-investment, making the total of \$22,260. They finally discuss the question of any special allowance by reason of peculiar adaptability or suitability for some particular purpose, and conclude that this has no application here. These houses were commonplace houses, of a commonplace type, having no special adaptability for converting into duplex houses, and there is nothing to shew that the market value, which is the real test, was increased by reason of the possibility of converting the houses into duplex houses.

Judge Morson expresses his dissent forcibly. He thinks that the costs (by which I take it he means the replacement cost) should have greater weight in determining the market value. He further thinks that the scheme of converting these houses into duplex houses, and so increasing largely the rental value, has not been given sufficient weight. In 1914, when the repairs were made, Mr. Lennox had the intention of converting the houses into duplex apartments, and so spent more money than he would otherwise have spent in excavating a cellar under the entire house, which would not have been necessary unless the cellar was to be subdivided and two furnaces afterwards installed, and in other ways. He (Judge Morson) also thinks that too much importance has been attached to the evidence of certain other sales. Finally he adopts as the proper principle this: where there is conflict of evidence, the proper course to pursue is the middle course between the two as laid down by the late Chancellor Boyd in *Munsie v. Lindsay* as follows: "It is not as a general thing the best rule in cases of varying opinion as to value to reject one set of witnesses in

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*toto* and to adopt the figures of an opposing set. One might rather suspect that neither was exactly to be followed, and that truth lay somewhere between the extremes." He would allow \$90 a foot for the land and would value the buildings at \$3,450, including some small allowance for disturbance, making a total of \$29,700.

On appeal, Judge Coatsworth enumerates factors to be considered in determining the value of property, states his belief that all the witnesses are honest and able, and then points out "how honest people differ in their judgment of matters supposed to be peculiarly within their knowledge." The highest valuation of the property being over \$40,000, and the lowest price under \$20,000, he then quotes as his guiding principle the words of the late Chancellor Boyd in *Munsie v. Lindsay*, 11 O.R. 520, already quoted by Judge Morson, and continues: "Keeping this in mind and having before me also the many considerations I have stated above, my conclusion is that the majority award comes too nearly to adopting the lowest estimate and does not allow the claimant the sum to which she is fairly entitled. . . . I then turn to the minority estimate and ascertain whether it is at a figure, under all the circumstances, fair and reasonable. After carefully reviewing the evidence and the exhibits and considering the authorities cited, I have arrived at the conclusion that the majority award is too low and the minority award is too high, and I have, so to speak, again to apply the principles of the Chancellor's opinion as between the two awards." Applying this, he fixes the value of each house at \$4,100, being \$1,100 for land and \$3,000 for buildings, making a total of \$24,600. He then adds to this 10 per cent., holding that he is bound by cases which he cites to allow this percentage, making a grand total of \$27,060.

I desire most strongly to protest against the idea put forward by both the dissenting arbitrator and the learned County Court Judge that justice is to be attained by any process of "splitting the difference," and particularly against the idea that an appeal from the award of a board of arbitrators should be determined by "splitting the difference" between the assessment of the majority and the minority.

In the case in the Supreme Court, *Grand Trunk Railway Co. v. Coupal*, 28 Can. S.C.R. 531, the arbitrator had followed four different ways or methods by which a conclusion might be arrived at as to the amount to which the claimant was entitled; he then ascertained the average of the sums arrived at by these four methods, and, ignoring the odd figures, made his award at the sum thus arrived at, confirming it by taking the average of the values sworn



to by all the witnesses called, a method which the Court described as absurd and impossible to be supported.

A few years later the same Court, in the case of *Fairman v. City of Montreal* (1901), 31 Can. S.C.R. 210, where twelve witnesses had been called and there was great variance in their opinions and the trial Judge considered all the witnesses called competent and reliable and took the average of their figures given in determining the amount to be allowed, condemned in strong language, upon the authority of the case already referred to, the course adopted by the trial Judge.

I do not regard what was said by the late and much lamented Chancellor Boyd in *Munsie v. Lindsay* as justifying the course adopted. He points out, what is obvious enough, that the opinions of experts will differ. It may be taken for granted that no expert will be called by the claimant except one whose opinion is that the property has large value, and no one will be called by the expropriating body except one whose opinion is favourable to it. These may be taken as the extreme limits, and somewhere between is the true value. It may be very near one or the other, but there is nothing to suggest that it is half-way between the two extremes, or that the average, where many witnesses are called, is a safe guide. This is really all that was said: "It is not as a general thing the best rule in cases of varying opinion as to value to reject one set of witnesses *in toto* and to adopt the figures of an opposing set. One might rather suspect that neither was exactly to be followed, and that truth lay somewhere between the extremes" (11 O.R. at p. 526); and humourously the Chancellor adds that "even legally trained intellects had resorted to this expedient" (i.e., "splitting the difference"), "in despair of finding any more precise method of arriving at a conclusion." This is far from sanctioning the idea of average as the normal method of solving the problem.

The judgment of the learned County Court Judge and the opinion of the dissenting arbitrator are both of them vitiated by an erroneous application of the words of the Chancellor. While the learned County Court Judge enumerates many matters to be considered in arriving at an opinion as to value, he in no way explains how these operated upon his mind; and, after the most careful consideration I can give to his judgment, I feel impelled to disregard it and to form my own view upon the evidence before the arbitrators and the conclusions at which they arrived as though the case were before us on appeal from the arbitrators. I am not sure that this is not in any event the proper principle to apply. We are to consider whether the Judge was right in reversing the majority

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award, and I do not think we should approach the matter with a view of finding out whether the opinion of the learned County Court Judge upon the evidence, if it stood alone, should be supported. It must always be kept in mind that the arbitrators were those who had the advantage of hearing and seeing the witnesses, of viewing the premises, and, generally speaking, all that goes to engender reluctance on the part of an appellate tribunal to interfere with the finding of the primary tribunal. There should be no interference unless error on the part of the primary tribunal is clearly shewn. The task which the arbitrators were called upon to face was the ascertaining of the compensation to be paid the landowner for the taking of this parcel of land. The only thing they had to ascertain was the value of the land to the landowner. The principle to be applied has been discussed in many cases. Here the problem is the simplest possible: the land is not vacant land, but land which was all in use; buildings had been erected upon it suitable to the neighbourhood in which it was situate, so that the use to which the land could be put was no problem; the entire parcel was taken, so the problem is not complicated by any consideration as to the effect of the taking upon lands remaining; the property was not occupied by the owner, but was rented, and so had no peculiar value to her; it was merely an investment; there was no interference of an existing business or going concern so as to introduce problems that arise in such cases. The neighbourhood was a residential neighbourhood of a definite class; there was none of the element of speculation incident to subdivisions and new areas. If the property could be compared to an individual, one might liken it to a staid, respectable clerk, well past middle age and a little out at the elbows; the future for it, as for him, holds nothing radically different from the past except the prospect of further decay. To this property, as to such an individual, "special adaptability" and "peculiar potentialities," etc., seem phrases entirely out of place.

Lord Halsbury in *Commissioners of Inland Revenue v. Glasgow and South-Western Railway Co.* (1887), 12 App. Cas. 315, at p. 321, says:—

"In ascertaining what is the value of the land it is extremely common, indeed it is inevitable, to go into a great number of circumstances by which that which is proper compensation to be paid for the transfer of one man's property to another is to be ascertained. A whole nomenclature has been invented by gentlemen who devote themselves to the consideration of such questions, and sometimes I cannot help thinking that the language which they have employed, so familiar and common in respect of such subjects,

is treated as though it were the language of the legislature itself. We, however, must be guided by what the language of the legislature is. Now the language of the legislature is this—that what the jury have to ascertain is the value of the land.”

So, here, the simple question these arbitrators had to determine was the value of the land taken, and I find little aid in reviewing, as the learned County Court Judge did, the artificial jargon indulged in by land valuator as to the mode of indicating the different aspects of the matter to be faced in ascertaining value. In most cases these expressions tend to obscure instead of clarifying thought. I accept as a statement as clear as possible of what this means the passage quoted by Mr. Justice Duff in *Toronto Suburban Railway Co. v. Everson*, 54 Can. S.C.R. 395, from the judgment of the Privy Council in *Fraser v. City of Fraserville*, 33 Times L.R. 179, as embodying the principle already laid down in *Lucas v. Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; *Cedar Rapids Manufacturing and Power Co. v. La Coste*, [1914] A.C. 569:—

“The value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired.”

This principle, it appears to me, the majority of the arbitrators endeavoured to apply to the case in hand; and, after carefully considering the evidence and their judgment, I am unable to see that they erred. I think I may certainly say that if I attempted to arrive at an independent valuation I should probably arrive at some different figure, but before I can interfere I must be convinced that they erred; and any figure that I would arrive at would not be widely different from the figure they have adopted, and the difference would be so trifling as not to warrant a change.

I agree with them that the evidence by which the value is sought to be established by ascertaining what it would cost to reconstruct the buildings to-day, when the cost of building is greatly advanced, and then by abating that sum by some arbitrary figure to indicate the proportion which the original value has lost by reason of this incidental decay, cannot here be relied upon as any safe guide; it is too uncertain; there are too many contingencies; too many factors to be considered, all of which rest on opinion, or, in other words, mere guessing. Reconstruction cost is a proper method to be considered where the property taken is one which must be replaced by the landowner. A factory is taken; the owner must re-build. The

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result of the taking is that he is forced, presumably, to re-build a similar structure on a similar site. He is out of pocket what this costs, but he has a new building, and so the cost must be abated to meet this. But here the property was merely an investment.

I find little illumination personally from the evidence of sales of other parcels of land in the vicinity. Where the case is one relating to vacant land, the sale of other vacant land similarly situated is, no doubt, a valuable guide; but, where the sale is the sale of dissimilar houses situated in dissimilar neighbourhoods, the price paid can only be made a guide when many factors are brought into play. How far the different style of building has influenced the price must be ascertained; how far its condition of repair is a factor must be considered; but above all this there are subtle but yet real differences in the value of buildings according to the exact location, even in similar neighbourhoods. A house in street A. may be marketable at 50 per cent. more than a precisely similar house in street B., but it is not easy to ascertain the influence which fixes the price. It may depend upon the taste of individuals or on reasons that are not obvious or perceptible. It is not long since that a change was made in the name of a street in this city, at the suggestion of a property-owner, because the ill-repute the street had obtained owing to numerous prosecutions in the police court had depreciated the street for residence purposes, for no one would admit living in this street without blushing.

With regard to the evidence of sales, there is another matter to be considered: the mere fact that a certain price was paid is not in itself any evidence of value or evidence of the kind of value which is essential to be considered here. In each case the circumstances surrounding the sale should be shewn, for "market value of property taken or injured for public use means the fair value of the property as between one who wants to purchase and one who wants to sell, its present value at a sale which a prudent owner would make if at liberty to fix the time and conditions of sale, not what could be obtained for it at a forced sale or under peculiar circumstances, nor a value obtained from the necessities of another:" 20 Corpus Juris, 727. A perfect illustration of the fallacy of this type of evidence is given in the evidence in this case shewing the purchase of the property here in question in 1895; \$4,500 was then paid; Mr. Lennox was evidently a willing purchaser; and from this evidence the man who sold to him was a willing vendor. The land at that time was worth \$3,000. Mr. Lennox scorns the idea that \$1,500 then represented the value of the buildings. His explanation is that the vendor did not reside in Toronto, had bad luck with



the renting of his premises, and was thoroughly disgusted with the situation, and was ready to sell at a sacrifice at any price to get rid of that which was a nuisance to him. I agree with Mr. Lennox that this is no test of the value, but it shews how little weight should be given to the mere proof that a certain house was sold at a certain price on a certain date without any evidence shewing the surrounding circumstances. In this case the landowner has given no satisfactory evidence from real estate valuers as to the value of the property. The evidence which is given on the part of the Board of Education is apparently entirely satisfactory, and this evidence fixes the value of the property considerably below the sum awarded.

There is a factor to which, possibly, enough consideration was not given by these valuers, but the amount awarded in excess of the valuation is more than ample to cover it. In 1914, when the buildings were rehabilitated by Mr. Lennox, he did certain work, he says, looking to the conversion of these buildings into duplex houses, and that work then done has in the meantime been unproductive; yet it is available if the owner choose to make use of it. Some of this work, i.e., the electric light wires and the water-pipes, might have been made available so as to increase the rental value by modernising the houses as they stood. The exact cost of this is not clearly shewn, and there is much to lead one to the view that the scheme of converting these old houses into duplex tenements—if ever seriously entertained—was definitely abandoned at the time. However, if every advantage is given to the landowner in this regard, the award is ample to cover it.

It has been said that the value of any investment can best be determined by its actual yield. Here the actual yield for each house was a rental of \$300, from which would have to be deducted taxes, insurance, and repairs. Experience has shewn that to secure a return of 6 per cent. upon an investment such as this, the gross return should be 10 per cent. upon the value. With the better class of property a gross return of 8 per cent. might be sufficient to yield 6 per cent. Insurance and taxes can be ascertained, the expense of repairs is uncertain and incapable of being ascertained except by experience. Here there had been no repairs save such as the tenants made. The result is shewn by the evidence accepted by the arbitrators, though contradicted by Mr. Lennox. The buildings were in a bad state of repair and a large expenditure was inevitable. If this test is applied, the award of the majority is liberal.

There remains the question of the allowance for the disturbance of the investment. The majority have allowed 6 per cent. The learned County Court Judge seems to think that he is compelled to

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allow 10 per cent., but the very cases which he cites shew that this is not so. Here 6 per cent. is an ample allowance. There is no reason to suppose that the fund could not be reinvested in less than a year.

I cannot part with this case without once more drawing attention to the extremely cumbersome and unsatisfactory machinery provided for the solution of what is after all a simple problem. The expense of such an arbitration as this is out of all proportion to the amount actually in dispute. I have given above the arbitrators' fees, and when there is added to this the fees to counsel, solicitors, and witnesses, it will be seen that the cost of this arbitration and appeals will probably equal the amount in dispute—it may be will exceed it. I have not been able to understand why the value of land to be taken should not be determined by the County Court Judge as part of his judicial duties without extra remuneration. If this were done, I am satisfied that in the end a more satisfactory result would be arrived at, at a small fraction of the expense now involved. There would then be much less evidence if an appeal was thought desirable, and the expense of the appeal would be minimised.

In the result, I think the appeal should be allowed and the award of the majority of the arbitrators should be restored, and I can see no reason why the costs of the appeals should not follow the event.

*Appeal dismissed, subject to a variation in the order (MIDDLETON, J.A., dissenting as to the dismissal).*

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[APPELLATE DIVISION.]

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 Feb. 19.

DRISCOLL V. COLLETTI.

*Negligence—Motor Vehicles upon Highway—Collision—Findings of Jury—Borrowed Car—Excessive Speed—Bad Judgment in Making Turn—Injury to Passenger in Borrowed Car—Whether Trespasser—Implied Permission of Owner to Borrower—Liability of Owner to Injured Passenger—Violation of Implied Prohibition—Highway Traffic Act, 1923, secs. 24, 25, 42(1)—Authority of Decisions—Judicature Act, sec. 32(1)—“Decision” of Divided Court.*

The plaintiff, seated in a motor car, borrowed by his brother from C. and driven by his brother, was injured when this vehicle came into collision with another upon a highway. The plaintiff sued C., the executors of the owner of the other car, and his (the plaintiff's)

brother. The jury found that the car was lent to the brother alone; that the plaintiff was merely in the position of a person invited to accompany the borrower; that the collision was caused by the negligence of the brother, "by excessive speed at the intersection and bad judgment in turning to the left instead of to the right:"—

*Held*, that the plaintiff was not a trespasser—he was in the car by the implied permission of the owner.

(2) That, so far as speed was concerned, there was no violation of the Highway Traffic Act, 1923, 13 & 14 Geo. V. ch. 48, which could make C. (the owner of the car) liable under sec. 42(1) for a violation of the Act.

(3) But sec. 25 imposes a penalty on a "person who drives a motor vehicle on a highway . . . negligently;" and the negligence of the driver, found by the jury, was a violation of the implied prohibition of sec. 25, for which the owner could be made liable to a person upon the highway injured by reason of the negligence of the driver: sec. 42(1).

Review of the authorities.

(4) And a person who is carried in the car as a non-paying passenger—as the plaintiff was—and is injured by the negligence of the driver, may recover damages from the owner.

*Parlov v. Lozina and Raolovich* (1920-21), 47 O.L.R. 376, 49 O.L.R. 299, followed.

(5) The "decision" of an equally divided Divisional Court is binding on all Divisional Courts: Judicature Act, sec. 32(1).

The authorities before the Judicature Act of 1895 considered.

AN appeal by the defendant Colletti from the judgment of ROSE, J., upon the findings of a jury at the trial (6th October, 1925), in favour of the plaintiff for the recovery of \$750 and costs in an action for damages for personal injury sustained by the plaintiff in a collision of motor vehicles upon a highway, the plaintiff alleging negligence on the part of the defendants or some or one of them.

December 18, 1925. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

*Gideon Grant*, K.C., for the appellant, argued that the car was lent by him to Cyril Driscoll (brother of the plaintiff) alone; that the permission to use it was purely personal; that there was no evidence that Cyril had asked leave to take his brother with him; and so the plaintiff, in relation to the appellant, was a trespasser: Halsbury's Laws of England, vol. 1, p. 540; Story on Bailments, 9th ed., para. 234. The borrower must use the borrowed article only for the purpose for which it is lent. The Highway Traffic Act was passed to protect people in the street.

*C. W. Bell*, K.C., for the plaintiff, respondent, contended that the appellant had given an implied permission to Cyril to take the plaintiff with him in the car, and was responsible under the provisions of the Highway Traffic Act, 1923, 13 & 14 Geo. V. ch.

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App. Div.	48, sec. 42(1): <i>Parlov v. Lozina and Raolovich</i> (1920-1), 47
1925.	O.L.R. 376, 49 O.L.R. 299; <i>Gray v. Peterborough Radial Railway Co.</i> (1920), 47 O.L.R. 540; <i>Barnard v. Carnegie</i> (1924), 26
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February 19, 1926. The judgment of the Court was read by RIDDELL, J.A.:—The defendant Colletti is a “jitney-driver” and owns a motor car. Cyril Driscoll borrowed the car from him—“he was going out with somebody,” and the said defendant was “just giving them the car for the day.” Driscoll told the defendant that “he would like to go out this afternoon,” “that if I would give him the car . . . he was going out with somebody;” “so I don’t know exactly” (says Colletti) “if he was going out with his brother or who he was going out with.” Cyril asked his brother, the plaintiff, to drive with him, and he did so. Cyril driving, as he always did when he borrowed a car and the plaintiff rode with him, drove with “excessive speed and bad judgment,” had a collision with another car, and the plaintiff was injured. The plaintiff sued Colletti, his own brother Cyril, and the executors of the owner of the other car.

The jury found the following answers, which are wholly justified by the evidence:—

1. Q. Did Colletti lend the car to Cyril Driscoll and Frank Driscoll or to Cyril Driscoll alone? A. Cyril Driscoll alone.

2. Q. Did Cyril Driscoll drive the car (a) because he had borrowed it, and Frank was merely in the position of a person whom he had invited to accompany him? or (b) because Cyril and Frank had arranged that Cyril should drive? A. (a) Yes; (b) No.

3. Q. Was the collision caused by the negligence of Cyril Driscoll? A. Yes.

4. Q. If so, in what did such negligence consist? A. By excessive speed at the intersection and bad judgment in turning to the left instead of to the right.

5. Q. Was the collision caused by the negligence of Diebl, the driver of Pinckney’s car. A. No.

6. If so, in what did such negligence consist? A.

7. Damages? A. \$750.

Judgment was entered against Colletti and Cyril Driscoll for \$750 and costs—and Colletti now appeals.

A very careful and ingenious argument was made before us, based upon the hypothesis that the car was lent to Cyril alone, and the plaintiff was *quoad* Colletti a trespasser. I find myself

unable to take that view; even ignoring, as, in view of the evidence at the trial of both the plaintiff and Colletti, I think we may, the statements made on examination for discovery by the plaintiff, indicating Colletti's knowledge that the plaintiff was going in the car, we have enough to shew that the defendant Colletti gave an implied permission to Cyril to take the plaintiff with him in the car. The appellant cannot, I think, set up that the plaintiff was a trespasser.

The liability of the appellant, if any, is based upon the Highway Traffic Act, 1923, 13 & 14 Geo. V. ch. 48, sec. 42(1) (Ont.), which reads:—

“The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation.”

The accident was caused, as the jury have found, by (1) extreme speed at the intersection and (2) bad judgment in turning to the left instead of the right (in this answer we should of course logically omit the first three words)—both these are, indeed, common law negligence.

The speed allowed—in the sense of not being forbidden—by the statute is (sec. 24) 25 miles per hour: this is, in the case of an intersection “where the driver of the vehicle has not a clear view of any approaching traffic,” limited; but nothing of the kind appears here. So far as this section is concerned, no violation of the Act is found.

But sec. 25 imposes a penalty on a “person who drives a motor vehicle on a highway . . . negligently . . .;” and that Cyril is found to have done.

As to the second cause we must look a little more clearly at the facts.

The car containing the plaintiff going northerly on the Guelph highway, a large car from the west came along the intersecting Dundas highway and passed the front of the car; Cyril proceeded at the same speed to the intersection; and, the Pinckney car appearing to the east on the Dundas highway going west, Cyril swerved to the left, the west, and there was a collision.

Assuming that, finding himself in imminent peril, Cyril in turning to the west instead of to the east exercised bad judgment and that bad judgment could under the circumstances be imputed to him as negligence, it was not a violation of any section of the

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App. Div. Act unless it comes under sec. 25—driving “a motor vehicle on a  
 1926. highway . . . negligently.”

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 v. Law; but, nevertheless, it was a violation of the implied prohi-  
 COLLETTI. bition of sec. 25—for every penalty imports a prohibition—and  
 Riddell, consequently it comes within the very words of sec. 42(1).  
 J.A.

The sole question in my mind is: to whom and in what cases “the owner shall be responsible?” There can be no question that he is responsible for damage done to a person using the highway by riding a bicycle thereon, although the case of *Mattei v. Gillies* (1908), 16 O.L.R. 558, may not go so far, except in a *semble*. He is responsible for damage to one driving on the highway: *Smith v. Brenner* (1908), 12 O.W.R. 9, 1197. There it was said (p. 12) that “the meaning of the statute is that every owner of a motor vehicle, having obtained a permit, must see to it that his motor shall be kept and managed as the statute provides—that he, the owner, shall either manage it himself and keep within the Act, or see to it that those who get possession of it in any way shall obey the rules laid down by the Act. And this he must do at his peril. If he place the vehicle in the hands of a chauffeur, or lend it to a friend, he is putting it in the power of servant or friend to manage it in a manner which may be dangerous; and he must assure himself of the capacity and prudence of servant or friend at his peril.”

*Bernstein v. Lynch* (1913), 28 O.L.R. 435, was a similar case. At p. 439, Sutherland, J., in delivering the judgment of the Court, quoted this language with approval.

In *Lowry v. Thompson* (1913), 29 O.L.R. 478, at p. 485, it was said that it was “the clear meaning of the statute that the owner of a motor vehicle shall be liable in damages for any damage done by his vehicle by reason of violation of the Act. . . .” see *Cillis v. Oakley* (1914), 31 O.L.R. 603.

He is responsible to one using the highway with an automobile: *Verral v. Dominion Automobile Co.* (1911), 24 O.L.R. 551; *Godfrey v. Cooper* (1920), 16 O.L.R. 565; *Gillett v. Bedard* (1921), 20 O.W.N. 29; *Sunston v. Russell* (1921), 21 O.W.N. 160; *Aikens v. City of Kingston* (1922), 23 O.W.N. 159, 53 O.L.R. 41; to one using the highway on foot: *Wynne v. Dalby* (1913), 30 O.L.R. 67; *Downs v. Fisher* (1915), 33 O.L.R. 504; *Hirshman v. Beal* (1916), 38 O.L.R. 40; *Walker v. Martin* (1919), 45 O.L.R. 504, 46 O.L.R. 144; *Whitten v. Burtwell* (1920), 47 O.L.R. 210; *Le Bar v. Barber and Clarke* (1922), 52 O.L.R. 299; *Foster v. Zavitz* (1923), 24 O.W.N. 127; to one using the high-

way with a motor cycle: *Coop v. Robert Simpson Co.* (1918), 42 O.L.R. 488.

So far there can be no difficulty. Any one on the highway has the protection of the statute, but does it go farther? Can one who is riding as a non-paying passenger in the car and is injured by the negligence of the driver claim damages from the owner?

The first case in which the point came up is *Parlov v. Lozina and Raolovich* (1920), 47 O.L.R. 376, in which my brother Middleton says:—

“I realise fully that an action brought against the owner of an automobile who is entertaining his friends gratuitously does not commend itself to one and bears rather hardly upon the co-owner of the car, but it is admitted that the provisions of the Motor Vehicles Act leave no way of escape for him, when once the other owner is liable.”

In that case, however, the owner admitted liability—and *Quilibet renunciare potest juri pro se introducto*. But the case came up in appeal in 49 O.L.R. 299—the case of *Gray v. Peterborough Radial Railway Co.* (1920), 47 O.L.R. 540, having in the meantime been decided by my brother Orde. In the *Gray* case Mr. Justice Orde considered the point as of first instance, and held the owner liable. “I am of the opinion,” he said (p. 547), “that the provisions of sec. 19, in view of the wide judicial interpretation already given to them by the decisions I have mentioned, are not to be limited to cases of injuries to persons using the highway other than the occupants of the motor vehicle itself, but extend to cases like the present, where the occupant of the car is no sense a party to the use of the vehicle upon business which is not that of the owner and is not aware of the fact that the car is being so used.”

The *Parlov* case led to a division of opinion in the Appellate Division (49 O.L.R. 299), but the division of opinion was not along the lines now in view. The late Chief Justice of Ontario and Hodgins, J.A., thought the part owner liable; Magee, J.A., held that he was not liable, on the ground that the right of action against the co-owner who was driving was in contract and the liability of the owner arose only on negligence under sec. 11(2). He was of opinion that “the public . . . protected in that section are not the occupants of the motor car causing the damage.” Mr. Justice Ferguson did not think it necessary to consider the correctness of the decision of Mr. Justice Orde, but, “assuming the correctness of the decision of Mr. Justice Orde,” held the co-owner not liable.

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It will be seen that, while the Chief Justice of Ontario and Mr. Justice Hodgins held that the Act applied, Mr. Justice Magee, while confessing "an inclination to share the views of Orde, J., in *Gray v. Peterborough Radial Railway Co.*, 47 O.L.R. 540, at p. 546," considered that the Act did not apply in the particular case, by reason of the status of the plaintiff as not one of "the public . . . protected in that section," and Mr. Justice Ferguson, while assuming the correctness of Mr. Justice Orde's decision, held that the Act did not apply by reason of the status of the defendant, a co-owner whose assent was necessary to enable the driver "to perfect his right to dominion and control of the automobile." The Court being equally divided, the appeal was dismissed.

In *Welsh v. St. Lawrence Oil Co.* (1924), 26 O.W.N. 338, Mr. Justice Lennox followed *Gray v. Peterborough Radial Railway Co.*

It may be noticed that in *Scott v. Philp* (1922), 52 O.L.R. 513, the applicability of another section, 23, of the Act, in the case of the injury being done to a building adjoining the highway, was doubted. The decision, however, is not helpful here. I held in a *nisi prius* case of *Brown v. Yellow Cab Ltd.*\* that sec. 23 does not apply in favour of a passenger for hire.

Were the case of first instance, I think I should be of the opinion that the plaintiff here was not in such a position that the defendant must be responsible to him. I should agree in the view of Magee and Ferguson, J.J.A., that the Act did not apply. The Chancellor, it seems to me, hits the nail on the head, *rem acu tangit*, in *Verral v. Dominion Automobile Co.*, 24 O.L.R. 551, at p. 554, when he says:—

"The Legislature has intended that this dangerous use of these licensed vehicles, when the statute has been violated, should be compensated for to those who suffer, by the proprietor of the vehicle. As between him and the public who use the highways, he is the responsible party, and it behooves him to use all necessary safeguards to prevent this abuse."

But I think that we should follow the decision in the *Parlov* case.

It is true that in England, where there was "no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank," and "it does so simply from what may be called the comity among Judges," a Court not of last resort held that it was not bound by a previous judgment

\* The judgment of Riddell, J., at the trial of that case is not noted or reported. The judgment of a Divisional Court on appeal from his judgment is noted in 29 O.W.N. 405.

even of its own in which the Court were evenly divided, but "it will exercise an independent opinion," if the same point comes before it again: *The Vera Cruz No. 2* (1884), 9 P.D. 96, at p. 98.

In the House of Lords—see *Beamish v. Beamish* (1861), 9 H.L. C. 274; *Attorney-General v. Dean and Canons of Windsor* (1860), 8 H.L.C. 369—the decision by an equally divided House is binding.

The former was also the rule laid down for itself by the Supreme Court of Canada in *Stanstead Election Case, Rider v. Snow* (1891), 20 Can. S.C.R. 12.

In this Province, before the legislation shortly to be mentioned, we had *In re Hall* (1883), 8 A.R. 135. There Burton and Patterson, J.J.A., thought the House of Lords rule inapplicable; Patterson, J.A., saying at p. 137:—

"But when the analogy is pushed farther than this, and it is said that the House of Lords cannot decide a question of law contrary to a former decision of its own; and that its judgment dismissing an appeal because votes are equally divided amounts to an affirmance of the law decided in the Court below, and binds the House just as it would be bound if the vote had been unanimous, and that in both of these particulars the same rule applies to this Court, I am not prepared to assent.

"I am not convinced that, as to the House of Lords itself, the rule goes to the extent asserted; but assuming it to do so, I do not understand it to be founded upon a principle which applies to this Court."

This was not, however, necessary to the decision, and the point is not so much as mentioned by Hagarty, C.J., or Spragge, C.J.O.

Then came *Clarkson v. Attorney-General for Canada* (1889), 16 A.R. 202, and it was said (p. 211) that "in theory at least the rule laid down" (in *The Vera Cruz No. 2*, 9 P.D. 96) "applies to our own Court of Appeal."

So far there was no statutory rule. Then came the Judicature Act of 1895, 58 Vict. ch. 12 (Ont.), which, by sec. 79, enacted: "The decision of a divisional court of the Court of Appeal in a question of law or practice shall, unless overruled or otherwise impugned by a higher court, be binding on the Court of Appeal and all divisional courts thereof, as well as all other courts and judges and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision, unless and until so overruled or impugned."

The present provision is to be found in the Judicature Act, R.S.O. 1914, ch. 56, sec. 32(1): "The decision of a Divisional Court on a question of law or practice unless overruled or otherwise impugned by a higher court shall be binding on all Divisional

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Courts and on all other courts and judges and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision."

The language is perfectly general—a "decision" is no less a "decision" because it is the decision of an equally divided Court—the terminology is always applied to such "decisions."

Moreover, I am unable to see the object of or necessity for such legislation if that is not the effect. So far as I know, the only decisions "of a divisional court of the Court of Appeal" which the Court considered "could" be departed from in subsequent cases were "decisions" of an equally divided Court.

I would dismiss the appeal with costs.

It may well be that the intention of the Legislature has not been correctly interpreted—in any case the matter seems worthy of consideration, with the view of amending or clarifying the legislation.

*Appeal dismissed.*

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## [APPELLATE DIVISION.]

MACRAE MINING CO. LTD. v. TOWNSHIP OF BUCKE.

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*Mines and Mining—Grant by Crown of Mining Rights—Subsequent Grant of Surface Rights to same Grantees—Distinct and Separate Estates—Whether Merger Resulting—Sale by Municipality for Taxes—Tax Deed—Construction—Validity as to Surface Rights only—Registration—“Land”—Land Titles Act, secs. 42, 91, 93—Assessment Act, secs. 40(4), 178—Conveyancing and Law of Property Act, sec. 36—Mining Act of Ontario, sec. 2(n)—Mining Tax Act, secs. 2(a), 15—Certificate of Title—Amendment.*

Where the ownership of mines or minerals has been severed from the ownership of the surface rights in land, the severance creates two separate physical entities, so that the surface rights and the mineral rights are as separate and distinct parcels of real estate as are two parcels of land lying horizontally side by side; and the doctrine of merger has no application in such a case, even though the title to the surface and to the mineral rights become vested in the same person.

The provisions of the Mining Tax Act, R.S.O. 1914, ch. 26, secs. 2(a) and 15, the Assessment Act, R.S.O. 1914, ch. 195, sec. 40(4), and the Land Titles Act, R.S.O. 1914, ch. 126, sec. 93, are harmonious in this view.

In this case separate patents were issued by the Crown on different dates, to the same persons, for the mines, minerals and mining rights in, upon, and under a certain parcel of land, and for the surface rights in the same parcel, and the mining rights were transferred by one conveyance and the surface rights by another conveyance to the plaintiff company, which brought this action for a declaration of its ownership of the mining rights:—

*Held*, that, even if the doctrine of merger was applicable, there was no merger here; for, by sec. 36 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, there shall be no merger by operation of law only of any estate, the beneficial interest in which, prior to the Judicature Act, 1881, would not have been deemed merged or extinguished in equity; in equity the question of merger does not depend upon the mere fact of union of the two estates in the same person, but upon the intention of the parties concerned; and in this case it was for the benefit and must have been the intention of the owner of both estates that there should be no merger, for as long as the mineral rights remained separate they were not assessable for municipal taxes: Assessment Act, sec. 40(4).

The township corporation made a sale to R. for taxes in arrear, and the description in the tax deed was as follows: “All that certain parcel or tract of land . . . containing twenty acres, more or less, being composed of the north half of parcel number 2831 in the register for Nipissing North Division, and is described as follows: . . . namely, the north half of the north-east quarter of the south half of lot number 14 in the first concession of . . . B., containing by admeasurement twenty acres, more or less:—

*Held*, by the whole Court, that the description was ambiguous and inconsistent.

And *held*, by the majority of the Judges (LATCHFORD, C.J., dissenting), that, being ambiguous, the deed should, upon its true construction,

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be confined to what the corporation had the right to tax and convey, viz., the surface rights.

Section 178 of the Assessment Act applied to make the conveyance of the surface rights to R. "valid and binding to all intents and purposes," it not having been questioned within two years.

The certificate of title under the Land Titles Act erroneously granted by the Local Master of Titles purporting to declare R. entitled to an absolute estate in the mining rights did not operate to destroy the rights of the plaintiff company, for under sec. 91 of the Land Titles Act a certificate of ownership is only *primâ facie* evidence of the matters therein contained, and it and the register can and should be amended to accord with the true situation.

Section 42 of the Land Titles Act governed the rights of the parties in this case; and, construing the tax deed as above stated, its registration by R. in the Land Titles office conferred upon him an absolute title to the surface rights, but did not affect the mining rights.

There should be judgment declaring the rights of R. and the other defendants claiming under R. in the surface, and declaring the plaintiff company the absolute owner of the mines, minerals, and mining rights.

*Per* LATCHFORD, C.J. (dissenting):—The tax deed should be treated, not as a conveyance of land, but as a conveyance of nothing more than mining rights as defined in the Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 2(n). As sec. 178 of the Assessment Act applies only where *land* is sold for taxes, and the sale was not of land, sec. 178 afforded no defence to the action. What was sold and conveyed was not *land* within the meaning of that word as employed in the Land Titles Act. Having regard to the provisions of sec. 66 and 93(1) of that Act, the purchaser of mining rights may be registered as the owner with an absolute title. The certificate issued to R. was, by sec. 91, *primâ facie* evidence of the matters contained therein; and no testimony given displaced that evidence.

AN appeal by the plaintiff company from the judgment of MOWAT, J., at the trial, dismissing the action.

December 4, 1925. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

T. N. Phelan, K.C., and A. M. LeBel, for the appellant company.

J. Cowan, for the defendant the Municipal Corporation of the Township of Bucke, respondent.

A. G. Slaght, K.C., for the defendant Mondon, respondent.

H. H. Davis, for the defendant Ritchie, respondent.

The facts and arguments are stated in the judgments.

February 19, 1926. LATCHFORD, C.J.:—This appeal is from the judgment of Mowat, J., of the 13th October, 1925, dismissing, with costs to the defendants other than W. S. Hall, an action

brought by the plaintiff for a declaration that it is the owner of the north half of the north-east quarter of lot No. 14 in the 1st concession of Bucke, or (in the alternative) is the owner of the mines, minerals, and mining rights in, upon, and under the said lands.

The plaintiff appeals and applies for a new trial on the grounds: (1) that the action was dismissed before the completion of the plaintiff's case; (2) that it was wrongly held that the onus of the proof of the irregularity of the sale was on the plaintiff; and (3) that there was also error in holding the lapse of two years from the date of sale to be a complete bar to the plaintiff's right to set aside a deed from the warden and treasurer of the township corporation to the defendant Ritchie.

The writ was issued on the 14th April, 1925. The statement of claim sets forth that on the 23rd November, 1907, the plaintiff became and had since continued to be the owner in fee simple of the north-east quarter of the south half of lot 14, concession 1, in the township of Bucke, containing 40 acres more or less; that on the 4th December, 1907, it acquired and still is the absolute owner of the mines, minerals, and mining rights in, upon, and under the same lands; that on the 16th February, 1920, the defendant municipality pretended to sell to the defendant Ritchie for taxes alleged to have been due for the years 1916, 1917, and 1918, and later purported to convey to him, the mines, minerals, and mining rights in, upon, and under the north half of the plaintiff's lands; that until long after Ritchie registered the tax deed the plaintiff had no notice or knowledge that any taxes were in arrear and unpaid, or that its said lands or any interests in them were sold or to be sold for taxes; that the township assessor wrongfully omitted, during the years 1916, 1917, 1918, and 1919, to assess the said lands against the plaintiff and to enter the name of the plaintiff on the assessment roll or to notify the plaintiff, and did in fact assess the lands in the name of a fictitious or non-existent corporation, and failed to make a valid assessment; that the collector of the municipality wrongfully neglected and omitted to make a sufficient or any demand on the plaintiff for the payment of the taxes for the years mentioned; that the township treasurer failed to give the notice required by sec. 171(2) of the Assessment Act; that the Master of Titles at Haileybury, owing to the neglect of the officers of the township to execute a proper deed, could not comply with the provisions of sec. 66 of the Land Titles Act; and that, as a result, the plaintiff received no notice that its land was liable to sale for taxes or that the north 20 acres had in fact been sold

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The plaintiff, therefore, sought a declaration that the taxes for the years 1916, 1917, and 1918 were not a charge on the lands, much less a charge on the mines, minerals, and mining rights or parcel 2831; that the tax deed is null and void; that the Land Titles records should be rectified accordingly; and that the plaintiff is the owner of the lands and entitled to the possession thereof, or, in the alternative, to the absolute ownership of the mines, etc., therein.

The defendant township corporation pleads that it sold the lands for overdue taxes for the years 1916, 1917, and 1918, under proper authority; that all notices required by the Assessment Act were given, and the sale was regular in every respect; and that, as the sale and tax deed were not questioned before any court of competent jurisdiction within two years from the date of sale, the defendant township corporation claimed the benefit of sec. 178 of the Assessment Act, and the plaintiff was entitled to no relief.

The defendant Ritchie alleges that he purchased the lands and the mineral rights therein and thereunder from the township corporation and obtained a transfer of the lands and mineral rights, which he duly had recorded, vesting in him an absolute title to the same; and that a certificate of title was duly issued to him for the said lands by the Local Master of Titles at Haileybury. He also pleaded the provisions of the Assessment Act, and asserted that under sec. 178 the plaintiff had lost its right, if any, to question the sale. Ritchie transferred to others all but one-sixth of his interest.

The defendant Maloof pleaded that on the 11th August, 1924, after making the usual searches in the Land Titles office at Haileybury, and without any knowledge of the plaintiff's claims or of any irregularities connected with the tax sale, he purchased in good faith and for valuable consideration a one-third interest in the property described in the statement of claim from one N. N. Maloof, a purchaser from Ritchie of the same interest, and that he caused a transfer to be registered. He further pleads the Assessment Act as a bar to the plaintiff's action against him.

Mondon's defence is virtually identical with Maloof's as to his purchase of an undivided one-third interest in the lands.

Hall alleges that in May, 1924, he purchased for \$500 an undivided one-quarter interest in the property and obtained and duly recorded his transfer. He asserts that he bought in good faith and without notice of irregularity, if any such there was, and that the plaintiff has no recourse against him.

When the action came on for trial, N. N. Maloof was added as a defendant. The action as against Hall was by consent dis-

missed with costs, and that defendant retained his one-quarter interest independent of the result of the action. It was made to appear that predecessors of the plaintiff in title were grantees from the Crown, first of the mines, minerals, and mining rights in the north-east quarter of the south half of lot No. 14, and later, by another patent, of the land itself, excluding the mines and minerals. The former patent was duly registered in the Land Titles office at Haileybury, for Nipissing, North Division, as parcel 2831, and the latter as parcel 2899. When a Land Titles office was established for the south section of the Temiskaming District, parcel No. 2831 was registered as No. 928 of the latter district. The land was subject to assessment by the township corporation, but the mines, minerals, and mining rights were not: Assessment Act, sec. 40(4).

The assessment rolls and other records of the municipality for the years for which the lands were sold and for 1919, 1920, and 1921, were not available, having been destroyed in the great Haileybury fire of 1922. The assessment roll for 1922 was extant, and Mr. LeBel sought at the trial to put it in as what he called "presumptive evidence" of errors in the earlier rolls which would place the onus on the municipality. His Lordship ruled quite properly against the admissibility of the evidence, and Mr. LeBel candidly stated that he had no other evidence available as to the rolls of the years for which part of his client's lands was sold.

The Local Master of Titles, Mr. Lorne Howard Ferguson, testified regarding the title of the parties to the action as shewn by the records in his office and by certificates which he had issued as Master.

The plaintiff mining company was proved to have acquired from the original patentees the mining rights included in parcel 2831, and the fee simple in the same area, exclusive of such rights, granted in parcel 2899. The transfer from the township corporation to Ritchie for which registration was sought on the 11th June, 1921, was of "the north half of parcel 2831 in the register for Nipissing North Division," described as follows, "situate in the township of Bucke . . . namely, the north half of the north-east quarter of the south half of lot number 14 in the first concession of the said township of Bucke, containing by admeasure-ment twenty acres more or less." This parcel covered nothing but mines, minerals, and mining rights, which, as such, were not subject to assessment, and therefore not to sale for non-payment of taxes.

When the transfer was presented for record, Mr. Ferguson mailed the notice prescribed by sec. 66 of the Land Titles Act,

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1926. he probably thought was the "proper post office address" of the  
MACRAE plaintiff. Its office, however, was never at Toronto, but always  
MINING Co. at Ottawa; and the plaintiff was said by Mr. LeBel not to have  
LTD. received any notice of the sale. The company appears not to  
v. have furnished Mr. Ferguson with its address, as required by sec.  
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After the lapse of three months from the mailing of the notice, the Master recorded Mr. Ritchie as the absolute owner of parcel 928, south section Temiskaming. Several transfers of interest from Ritchie in the same parcel were afterwards recorded, until at the date of the trial the ownership, according to the records of the Land Titles office, was stated to be in the defendants other than N. N. Maloof. Several cautions against it on their behalf were also entered; but with these the present action is not concerned.

On cross-examination Mr. Ferguson stated that for the purpose of his records, if no parcel had been specified in the tax deed or transfer, entered in his books as No. 20570, he "would have been obliged to take 'surface' away from parcel 2899 and 'mines and minerals' from parcel 2891," leaving the ownership of both (as to the north half of the north-east quarter) in Mr. Ritchie. He issued, on the 12th September, 1921, a certificate setting forth that under transfer No. 20570—the tax deed—Ritchie was "the owner in fee simple with an absolute title of that certain parcel of land registered under the Land Titles Act as parcel 928 in the register for south section Temiskaming, situate in the township of Bucke, in the district of Temiskaming, and Province of Ontario, namely, the north half of the north-east quarter of the south half of lot number 14 in the first concession of the said township of Bucke, containing by admeasurement 20 acres more or less," subject only to a reservation for roads, and taxes, etc., not material to be considered.

It is to be noted that, while parcel 928 (parcel 2891 of the Nipissing Division) is properly mentioned (the fact appearing on the face of that document and in the records of Mr. Ferguson's office that that parcel covered only "mines, minerals, and mining rights"), the subsequent description omits any reference to mines, etc., and applies only to the fee simple or surface rights in the 20 acres, part of parcel 2899.

The good faith of the Master was not questioned. He stated that "this certificate was issued in error, due notice of which was given to Mr. Ritchie . . . and he was notified that there had apparently been some error in not tying it to the particular parcel referred to in the tax deed." The notice was after this action



was commenced. Mr. Ferguson then pointed out to Ritchie that the certificate should have read "mines, minerals, and mining rights," and that as far as the surface rights were concerned the title still remained in the plaintiff.

When this witness retired from the box a lengthy argument followed. Mr. LeBel urged that sec. 178 of the Assessment Act was not a bar to the action; moreover, that the township corporation could not tax, much less sell and purport to convey, the mines, minerals, and mining rights; that the tax deed must be of "the lands sold," the north 20 acres, while what the township corporation purported to convey was "the mining rights;" and that, as the deed was not of lands but of mining rights, sec. 178 had no application.

Mr. LeBel stated that he wished to put in evidence as to want of notice to the plaintiff of assessments and sale, but the learned trial Judge considered that the matter was not open to attack after the lapse of two years, and ruled against the admissibility of such evidence. His decision appears to rest on the view that by sec. 178 of the Assessment Act the plaintiff was confronted by an insuperable objection; and it was mainly, if not wholly, on that ground that the action was dismissed.

The point raised that the township had not the power to assess for taxes and to transfer, as it purported to transfer, the mines, minerals, and mining rights in the north half of parcel 2831, does not seem to have been considered by the learned trial Judge.

On the argument of the appeal Mr. Phelan contended that, as the municipality had not the right to sell the mining rights, the transfer purporting to convey them was a nullity. He urged that in any event the plaintiff should be allowed to adduce evidence that the provisions of the Assessment Act in regard to notice of assessment and sale had not been complied with, and that sec. 178 of the Act could afford no defence, as the sale and transfer were not a sale and transfer of the plaintiff's land, which was not parcel 2831 but parcel 2899.

Mr. Slaght and Mr. Davis argued that it was not open to the plaintiff to contend that the transfer from the municipality was bad; sec. 178 was an absolute bar to the action; and the certificate issued by the Master of Titles in 1921 was conclusive evidence under the Land Titles Act that Ritchie was then the absolute owner of the mining rights in the 20 acres. If the plaintiff had any remedy, it was against the assurance fund under sec. 124 of the Act. The defendants who had acquired titles from Ritchie were *bonâ fide* purchasers for value and entitled to rely on his title as recorded. The effect of registration does not appear to

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App. Div. have received much attention in the Court below. Before dealing  
1926. with it, it may be well to revert to the sale for taxes.

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What could the defendant township corporation sell for taxes? Plainly only that which it had power to assess. The minerals in or under the plaintiff's land were not assessable: Assessment Act, sec. 40(4). Not being assessable, they, as such, could not be sold. The fact is not overlooked that, in the definition of "land" which the municipality had power to assess and to sell—sec. 2(h) of the Act—all mines, minerals, etc., are included. When, therefore, land is validly sold for taxes, the minerals "in, on, and under the land" pass to the purchaser.

The only evidence of what was sold to Ritchie, and there could of course be no better evidence—none that could displace it—is afforded by the tax deed itself, duly recorded as No. 20570 in Mr. Ferguson's office. What was sold and conveyed, and what forms the foundation of Ritchie's title and that of the defendants claiming under him, is by that registered document declared to be the north half of parcel 2831 of the Nipissing register (identical with parcel 928 of the South Temiskaming register), and nothing but the north half of that parcel. Now parcel 2831 (or 928) comprises not land—the land was parcel 2899—but only the "mines, minerals, and mining rights of, in, and under" certain described land. No doubt the municipality in a proper case could assess, sell, and transfer parcel 2899. Upon such a sale and transfer the mining rights in that parcel, in other words in parcel 2831, would pass to the purchaser. But what the municipality assumed to do, and what in my opinion it had no power to do, was to sell and convey a distinct property which it was not authorised even to assess.

Ritchie, had he chosen, could have said to the warden and treasurer: "You have conveyed to me not what you assessed and offered for sale, not what I purchased and paid for, but a different property." However, he was apparently satisfied with the deed of the potentially valuable mining rights, and he and his co-defendants rely upon that conveyance in its actual form. The words introduced by "namely" in the description mention, as identical with parcel 928, the area or surface rights—the parcel registered on the Nipissing District register as 2899—but this is another error. The parcels are distinct and are recognised most formally as distinct. I therefore think the words introduced by "namely" must be regarded as *falsa demonstratio*, and the conveyance treated as not of land but of nothing more than mining rights as defined in the Mines Act of 1906. 6 Edw. VII. ch. 11.

sec. 2(12), and the Mining Act now in force, R.S.O. 1914, ch. 32, sec. 2(n). App. Div.  
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As sec. 178 of the Assessment Act applies only "wherever land is sold for taxes and a tax deed thereof has been executed," and the sale, as evidenced by the transfer, was not of land, I am of the opinion that that section affords no defence to this action.

The next question arising is, whether under the circumstances sec. 42 of the Land Titles Act operated to confer on Ritchie an absolute title to the parcel described in the registered transfer.

This section enacts that a "transfer for valuable consideration of land registered with an absolute title, when registered, shall confer on the transferee an estate in fee simple in the land transferred, together with all the rights, privileges and appurtenances belonging or appurtenant thereto." The provision is subject to qualification not relevant to the matters in hand.

Was Ritchie a purchaser of the north half of parcel 928 for valuable consideration? If I am right in thinking that the municipality could not sell and that Ritchie did not purchase part of parcel 928, it follows necessarily, it seems to me, that he cannot be regarded as a purchaser of what the township's officers assumed to sell and convey.

Was parcel 928 "land," within the meaning of that term as it is employed in the Land Titles Act? The obvious purpose of the Act is to simplify titles to land. Unlike the Assessment Act and the British Land Transfer Act, 1897, sec. 24, our Act does not define the word "land." No case in the Ontario courts has interpreted the word. What was conveyed to Ritchie was, in my opinion, not *land* as the term is used in sec. 42, nor was it *land* or any of the particular interests in *land* mentioned elsewhere in the Act.

Section 93(1) was not brought to the attention of the trial Judge, nor was it mentioned on the argument of the appeal. It provides that "the proper Master of Titles may register" (as was done in this case) "the owner of any mines or minerals where the ownership of the same has been severed from the ownership of the land, in the same manner *and with the same incidents* in and with which he is by this Act empowered to register the owner of the land."

One of such incidents in the case of a sale of land for taxes is (sec. 66) that, after the three months' notice already referred to has been given, the purchaser may be registered, as Ritchie was, as the owner with an absolute title. The certificate issued to Ritchie on the 12th September, 1921, is, by sec. 91, *prima facie* evidence of the matters therein contained. No testimony given displaced that

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evidence. One of the matters contained in the certificate is that Ritchie is declared to be the owner with an absolute title of the north half of parcel 928.

Ritchie's co-defendants are purchasers from him for value, and as to their respective interests stand in the same position as does Ritchie.

The result is that the appeal fails and should be dismissed with costs.

MASTEN, J.A.:—Appeal by the plaintiff from the judgment of Mowat, J., dated the 13th October, 1925.

The pleadings in the action, the judgment below, and the contentions of the respective parties are fully set forth in the judgment of my Lord and need not be here repeated.

The matter in controversy relates to the ownership both of the surface rights and of the mines, minerals, and mining rights in the north half of the north-east quarter of the south half of lot No. 14 in the 1st concession of the township of Bucke, containing by admeasurement 20 acres more or less.

By a patent dated the 30th January, 1907, the Crown granted to James A. Macrae and James Mulligan in fee simple the mines, minerals, and mining rights in, upon, and under the north-east quarter of the south half of lot No. 14 in the 1st concession of the said township of Bucke; and by a subsequent patent dated the 1st February, 1907, the Crown granted to the same parties, Macrae and Mulligan, the surface rights in the same north-east quarter of the south half of lot No. 14 in the 1st concession of Bucke, containing by admeasurement 40 acres.

On or prior to the 4th December, 1907, Mulligan and Macrae transferred to the Macrae Mining Company, by separate and distinct conveyances, all their interest in the lands in question, both the surface rights and the mining rights—that is to say the mining rights were transferred by one conveyance and the surface rights by another.

By a treasurer's tax deed, bearing no date but registered on the 11th June, 1921, the Municipal Corporation of the Township of Bucke purported to convey the lands in question to J. I. Ritchie. A copy of the deed is as follows:—

“To all to whom these presents shall come: We, W. J. Adair, of the town of Haileybury, Esquire, Warden, and Morgan McCrank, of the townsite of North Cobalt, Esquire, Treasurer, of the Township of Bucke, send greeting:—

“Whereas, by virtue of a warrant under the hand of the warden

and seal of the said township bearing date the first day of October in the year of our Lord one thousand nine hundred and nineteen, commanding the treasurer of the said township to levy upon the land hereinafter mentioned for arrears of taxes due thereon, with his costs, the treasurer of the said township did, on the sixteenth day of February in the year of our Lord one thousand nine hundred and twenty, sell by public auction to John I. Ritchie, in the township of Bucke, that certain parcel or tract of land or premises hereinafter mentioned, at and for the price or sum of one hundred and thirty-six dollars and fifty-two cents (\$136.52) of lawful money of Canada, on account of arrears of taxes alleged to be due thereon up to the thirty-first day of December in the year of our Lord one thousand nine hundred and eighteen, together with costs.

"Now know ye, that we, the said W. J. Adair and Morgan McCrank, as Warden and Treasurer of the said Township, in pursuance of such sale, and of the Assessment Act, and for the consideration aforesaid, do hereby grant, bargain, and sell unto the said John I. Ritchie, his heirs and assigns, all that certain parcel or tract of land and premises containing twenty acres, more or less, being composed of: the north half of parcel number 2831 in the register for Nipissing North Division, and is described as follows: situate in the township of Bucke in the District of Nipissing, North Division, namely the north half of the north-east quarter of the south half of lot number fourteen in the first concession of the said township of Bucke, containing by admeasurement twenty acres more or less, excepting five per cent. of the acreage thereby granted for roads and the right to lay out the same where the Crown or its officers may deem necessary.

"In witness whereof we, the said Warden and Treasurer of the said county, have hereunto set our hands and affixed the seal of the said county this            day of            in the year of our Lord one thousand nine hundred and            and the Clerk of the County Council has countersigned."

It is to be presumed that, as recited in this deed, the taxes became due and unpaid for the years 1916, 1917, and 1918, and it is not in controversy that no taxes were paid by the plaintiff company for these years.

The assessment rolls for the years 1916, 1917, and 1918 are not available, as they were destroyed in the great fire at Haileybury, and no evidence as to their contents is before the Court.

As pointed out by my Lord the Chief Justice, the tax deed is ambiguous and inconsistent. The lands conveyed are described in two ways, namely, first as parcel 2831 in the Nipissing register

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App. Div. (which parcel covers only mines, minerals, and mining rights),  
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 half of lot number 14 in the first concession of the said township of  
 Bucke, containing by admeasurement twenty acres more or less."

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The first description, "parcel 2831," would by reference embrace mineral rights only, while the second description in its plain and natural meaning applies to surface rights. It is noteworthy that mineral rights as such are not anywhere expressly mentioned in the deed, and I am led to suspect that parcel 2831 was mentioned by clerical error instead of parcel 2899, which covered the surface rights; but of such mistake there is no express evidence.

The sections of the Assessment Act, R.S.O. 1914, ch. 195, bearing on the question in issue, appear to be:—

Section 2(h)—" 'Land,' 'Real Property' and 'Real Estate' shall include . . . all mines, minerals . . . in and under land."

Section 3—"All municipal, local or direct taxes or rates shall *where no other express provision is made* be levied upon the whole of the assessment for real property, income and business or other assessments made under this Act, according to the amounts assessed in respect thereof, and not upon any one or more kinds of property or assessment or in different proportions."

Section 40(4)—"The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to subsection 8, the minerals in, on or under such land, shall not be assessable."

Section 178—"Wherever land is sold for taxes and a tax deed thereof has been executed, the sale and the tax deeds shall be valid and binding, to all intents and purposes, except as against the Crown, unless questioned before some Court of competent jurisdiction within two years from the time of sale."

The next step is to consider the legal conclusion which results from the application to the facts of the statutes quoted, having regard to recognised legal principles. By sec. 40(4), "the minerals in, on or under such land" (i.e., mineral land) "shall not be assessable." What is granted by the patent from the Crown dated the 30th January, 1907, is "mines, minerals, and mining rights." Section 40(4) mentions specifically "minerals" alone, but I cannot understand how a township corporation could assess a mine if it could not assess minerals in the mine, nor how it could assess mining rights if it could not assess minerals to which the mining rights relate; hence I am of opinion that, at least so long as they remained distinct from the surface rights, the mines, minerals,

and mining rights granted by the patent of the 30th January, 1907, were not assessable by the township corporation. While mines, minerals, and mining rights are exempt from municipal taxation, they by no means escape taxation, being liable to the Province of Ontario for provincial taxes, as provided by the Mining Tax Act, R.S.O. 1914, ch. 26, secs. 5 and 15.

The provisions of the Ontario statutes, namely, the Mining Tax Act, R.S.O. 1914, ch. 26, secs. 2(a) and 15, the Assessment Act, R.S.O. 1914 ch. 195, sec. 40(4), and the Land Titles Act, R.S.O. 1914, ch. 126, sec. 93, appear to harmonise in the view that, where the ownership of mines or minerals has been severed from the ownership of the surface rights in the lands, such severance creates two separate physical entities, so that the surface rights and the mineral rights are as separate and distinct parcels of real estate as are two lots or pieces of land lying horizontally side by side. If this is so, and I think it is, the doctrine of merger has no application in such a case, even though the title to the surface and to the mineral rights become vested in the same person. But, if I am mistaken in this view, and if the doctrine of merger does apply, still there would be no merger in this case.

Under the provisions of sec. 36 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, there shall not be any merger by operation of law only of any estate, the beneficial interest in which, prior to the Ontario Judicature Act, 1881, would not have been deemed merged or extinguished in equity. In equity the question of merger does not depend upon the mere fact of union of the two estates in the same person, but upon the intention of the parties concerned, and this intention may be either expressed or it may be implied from the nature of the estates or other circumstances: *Ingle v. Vaughan Jenkins*, [1900] 2 Ch. 368. In that case Farwell, J., says (p. 370) :—

“ I think the proposition in Lewin on Trusts, 10th ed., p. 889, is correct—namely, that ‘ The principle by which the Court is guided is the *intention*; and in the absence of express intention, either in the instrument or by parol, the Court looks to *the benefit of the person in whom the two estates become vested*.’ ”

Here it was for the benefit of the owner of both estates that there should be no merger, for as long as the mineral rights remained separate they were not assessable for municipal taxes.

Where, as here, the description in the tax deed is ambiguous and inconsistent, I understand that we should, if possible, adopt that interpretation which is consistent with the powers of the township and which validates the deed given by its officers, accord-

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ing to the maxim *ut res magis valeat quam pereat*. In other words, we should hold that the specific description in the deed governs, and interpret the conveyance above quoted as transferring to Ritchie the surface rights which the township corporation was entitled to assess and to sell on default of payment of taxes, and we should reject as inconsistent and erroneous that part of the description which would make the deed assume to convey mineral rights, as to which the township corporation had no power to make an assessment, levy, or sale.

In support of that view I refer generally to the discussion of the subject in Broom's Legal Maxims, 8th ed., p. 410, and particularly to the following statement on p. 413: "So, if the King's charter will bear a double construction, one which will carry the grant into effect, the other which will make it inoperative, the former is to be adopted: *per* Tindal, C.J., *Rutter v. Chapman* (1841), 8 M. & W. 1, 102. And generally, 'if words have a double intendment, and the one standeth with law, and the other is against law, they are to be taken in the sense which is agreeable to law.' Shep. Touch. 80, adopted by Martin, B., *Fussell v. Daniel* (1854), 10 Ex. 581, 597." I refer also to the statement of the rule in Norton on Deeds, ed. of 1906, p. 214: "If there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect."

Nor does the position of the invalid description make any difference. In *Cowen v. Truefitt Ltd.*, [1899] 2 Ch. 309, Lindley, M.R., says (p. 311): "I must, however, protest against the way in which the doctrine was stated by the appellants' counsel—that the maxim *Falsa demonstratio non nocet* only applies when there is some incorrect description at the end of the sentence. That is whittling away the doctrine and making it ridiculous: it is a misapprehension."

Further, in the absence of evidence regarding the assessment rolls for the years 1917, 1918, and 1919, and regarding the various steps taken by the township's officers antecedent to the sale, there must be an assumption that *Omnia rite esse acta*, for where acts are of an official nature or require the concurrence of official persons, there is a presumption of their due execution, and everything is presumed to be rightly and duly performed until the contrary is shewn. Here the presumption is that taxes were in arrear in respect to the surface lands; that the right of the municipality to sell had arisen; and that the proceedings preliminary to a sale of the surface rights had been regularly and legally taken.



For these reasons, I think that the tax deed in question should be confined to what the municipality had the right to tax and convey, namely, the surface rights; and sec. 178 of the Assessment Act applies to make the conveyance of the surface rights to Ritchie "valid and binding to all intents and purposes," it not having been questioned before some court of competent jurisdiction within two years from the time of the sale.

It remains to consider the effect of the Land Titles Act, R.S.O. 1914, ch. 126.

The terms of the tax deed from the township corporation to Ritchie have already been recited in full and need not be repeated. This conveyance was registered in the office of Land Titles at Haileybury on the 11th June, 1921, and entered in folium 213, vol. 5, parcel 928, south section, Temiskaming, with a note appended: "recently pt. parcel 2831, Nipissing, North Division."

On the 4th November, 1925, the registrar issued a certificate of title, part of exhibit 1, the essential portions of which are as follows:—

"Parcel 2899 in the register for Nipissing, North Division. The present title of the land hereinafter mentioned as appearing by the books of this office is as shewn below, subject to the encumbrances hereinafter mentioned. . . . The said land is vested in fee by re-entry from parcel 4163 Nipissing. The Macrae Mining Company Limited are under transfer 11441, dated 21st October, 1907, registered 14th December, 1908, as to an undivided  $\frac{3}{4}$  interest, and under transfer 11442, dated 23rd November, 1907, registered 14th December, 1908, as to an undivided  $\frac{1}{4}$  interest, clothed with an absolute title. The said land is entered in parcel 2899 in the register for Nipissing, North Division, and is described as follows: situate in the township of Bucke, in the district of Nipissing, North Division, namely, the north-east quarter of the south half of lot number 14 in the first concession of the said township of Bucke, containing by admeasurement 40 acres more or less, saving and excepting the reservations and exceptions contained in the original patent from the Crown, namely, all ores, mines or minerals," etc.

"In witness whereof I have hereunto subscribed my name this 24th day of December, 1912.

"Note: Certif. issued when parcel 4163. Nipissing.

"J. M. Deacon, Local Master of Titles."

"By caution dated and registered the 14th May, 1925, John I. Ritchie claims to be interested in the north half of the parcel."

And the certificate concludes as follows: "I hereby certify

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 1926. 2899, Nipissing, North Division."

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By another certificate, dated the 3rd November, 1925, the following appears: " Parcel 928 in the register for south section, Temiskaming: the present title of the land hereinafter mentioned, as appearing by the books of this office, is as shewn below: subject to the encumbrances hereinafter mentioned, the said land is vested in fee in John I. Ritchie subject," etc. . . . " under transfer No. 20570, Temiskaming (under sale for taxes dated ), received 3rd June, 1921, and entered 12th September, 1921, entry having been delayed to admit service of notice under sec. 66 of the Land Titles Act, as enacted by (1914) 4 Geo. V. ch. 24, sec. 2, with an absolute right and title of the mines, minerals and mining rights, in, upon and under. The said land is entered in parcel 928 in the register for south section Temiskaming, and is described as follows: situate in the township of Bucke, in the district of Temiskaming, and Province of Ontario, namely, the north half of the north-east quarter of the south half of lot number 14 in the first concession of the said township of Bucke, by admeasurement 20 acres more or less " (excepting 5 per cent. for roads and with the usual exceptions). " In witness whereof I have hereunto subscribed my name this 12th day of September, A.D. 1921. Lorne H. Ferguson, Deputy Local Master of Titles. Note: Issued certificate." Thereafter follow six cautions which have either been withdrawn or otherwise superseded, and the following: " By transfer dated 19th May, 1924, registered 23rd May, 1924, N. N. Maloof transfers his undivided 3/6 interest to William S. Hall." " By transfer dated 14th May, 1924, registered 26th May, 1924, Ritchie transfers as mining lands an undivided 4/12 interest to Alfonse Mondoux." " By transfer dated 12th August, 1924, registered 17th August, 1924, N. N. Maloof transfers a 3/12 interest to John N. Maloof." And the interests are thereby stated to be as follows: Alfonse Maloof a 4/12 interest; John I. Ritchie 2/12; William S. Hall and Joseph N. Maloof 3/12 interest. Subsequently cautions were registered on behalf of D. D. Gordon, a shareholder in the plaintiff company, and by N. N. Maloof claiming to be interested in the share of William S. Hall.

The provisions of the Land Titles Act relating to this matter appear to be secs. 42 and 91. Section 42 provides: " A transfer for valuable consideration of land registered with an absolute title, when registered, shall confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges and appurtenances belonging or appurtenant thereto;" and sec. 91

provides as follows: "A certificate of ownership or certificate of charge shall be *primâ facie* evidence of the matters therein contained, and the office copy of a registered lease shall be evidence of the contents of the registered lease."

Section 91 of our Act differs from the provisions of the corresponding Acts in Australia and New Zealand, for while under those Acts the certificate of the Registrar or Deputy Registrar respecting the title is absolute and incontrovertible, sec. 91 of our Act makes the certificate of the registry *primâ facie* evidence only.

Section 42 of our Act is the section which appears to me to govern the rights of the parties under the present circumstances; and, if the deed from the township corporation to Ritchie ought to be construed in the way in which I have indicated, then the registration of that deed by Ritchie conveys to him an absolute title in the surface rights which cannot be questioned, but does not affect the mines, minerals, and mining rights. Ritchie acquires by the registration of his deed an absolute title in that which the deed conveys to him, namely the surface rights, and the certificate of title erroneously granted by the registrar giving him the absolute title in the mines, minerals, and mining rights, is only *primâ facie* evidence, and it and the register can be amended by the Court so as to make them conform to the true state of the title and so as to give to Ritchie that to which he is properly entitled, namely, the absolute title in the surface rights.

For these reasons, I would set aside the judgment dismissing the action, and in lieu thereof direct that a judgment be entered declaring the rights of the defendants in the surface and declaring that the plaintiff is the owner of the mines, minerals, and mining rights, with an absolute title, and directing that the register be amended accordingly.

Costs of the appeal and of the action to be paid by the defendants to the plaintiff after taxation.

RIDDELL and MIDDLETON, J.J.A., agreed with MASTEN, J.A.

*Appeal allowed (LATCHFORD, C.J., dissenting).*

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## [APPELLATE DIVISION.]

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*Insurance (Automobile)—Premium Rates—Discrimination—Complaint against Company—Inquiry by Superintendent of Insurance—Evidence Taken on Oath—Refusal to Allow Accused Company to Call Witnesses or Cross-examine Witnesses Called by Superintendent—Finding and Order of Superintendent—Appeal from—Order set aside—Fair Play and Natural Justice—Opportunity to be Heard—Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, secs. 13, 262—Amending Act, 15 Geo. V. ch. 54.*

A complaint was made to the Superintendent of Insurance, pursuant to the provisions of sec. 262 of the Ontario Insurance Act, 1924, as amended, that there was discrimination in the automobile insurance rates charged by an insurance company. The Superintendent made an investigation of the business of the company, and evidence on oath was taken before him, but he himself examined the witnesses summoned by him and refused to allow counsel for the accused company to cross-examine them or to produce evidence on behalf of the company. He found that there was discrimination, and made an order under subsec. 3 of sec. 262 directing that the discrimination be removed.

The Court allowed an appeal by the company under sec. 13 of the Act, and remitted the case to the Superintendent for trial according to law. *Held, per LATCHFORD, C.J., and RIDDELL, J.A.,* that the Superintendent was acting judicially and his actions might be called in question on appeal: his conduct violated every principle of fairplay and natural justice.

Review of the authorities.

*Local Government Board v. Arlidge*, [1915] A. C. 120, distinguished.

*Per MIDDLETON and MASTEN, J.J.A.,* that where the Superintendent is called upon to act and proceeds under sec. 262, he must afford both to the complainants and the accused company the opportunity of presenting their respective contentions and the evidence in support of them.

AN appeal by the company from an order of the Superintendent of Insurance, upon an investigation made by him pursuant to the provisions of sec. 262 of the Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, as amended in 1925 by 15 Geo. V. ch. 54, requiring certain premium rates and no greater to be charged by the company and a refund to be made of all charges made in excess of those rates.

February 4. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

*J.A. Macintosh, K.C.,* for the appellants, argued that they should have been given a hearing by the Superintendent of Insurance, and should have been allowed to adduce evidence and to cross-

examine witnesses at the investigation; that the Superintendent, in refusing them these privileges, acted in an arbitrary manner and contrary to natural justice and could find no warrant for his action in the Insurance Act. He was acting in a judicial capacity, and so should have heard both sides: *Brockwell v. Bullock* (1889), 22 Q.B.D. 567; *Masters v. Pontypool Local Government Board* (1878), 9 Ch. D. 677.

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*T. N. Phelan*, K.C., for the Employers' Liability Assurance Corporation, respondents, upheld the procedure of the Superintendent of Insurance, submitting that it was not a trial which was taking place before him, but an administrative detail, and that under the provisions of the Insurance Act he had a discretion as to whom he should hear: *Local Government Board v. Arlidge*, [1915] A.C. 120.

*F. P. Brennan*, for the Superintendent of Insurance and the Attorney-General.

February 19. RIDDELL, J.A.:—An appeal under sec. 13(1) of the Ontario Insurance Act, 1924, from a decision of the Superintendent of Insurance.

The facts of the case we have not gone into except to ascertain the procedure. I quote as far as possible the official language.

A written complaint was, on the 31st October, 1925, "made to the Superintendent of Insurance, pursuant to the provisions of sec. 262 of the Ontario Insurance Act, 1924, as amended, that discrimination exists in the automobile insurance premium rates charged by the General Accident Assurance Company of Canada, in the city of Hamilton."

That officer "caused an investigation to be made of the business of the company, and evidence was taken under oath relating to certain of its contracts of automobile insurance in the city of Hamilton."

The Superintendent thought it proper to subpoena witnesses, and, under sec. 12(3), "the evidence and proceedings . . . before the Superintendent" were "reported by a stenographer."

At the beginning of the proceedings, counsel for the accused company appeared along with the general manager and asked to cross-examine the witnesses, produce witnesses, etc., on behalf of the company. The Superintendent said:—

"I don't regard this hearing this morning as an inquiry at which parties interested should be represented by counsel or given the opportunity of submitting argument to me. . . . I propose to ask all the questions which are asked this morning, and would be glad to furnish the General Accident, or any interested party, with



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a copy of the sworn testimony presented to me. If you, Mr. Macintosh and Mr. Barrington, care to remain in the room and listen to the course of the examination, I shall be only too glad to have you remain. I should wish it understood, however, that, unless I see fit at a later hour to ask you to give evidence, you will not interrupt the examination or expect to be heard or cross-examine any of the witnesses."

In his formal memorandum, *Ontario Gazette*, 5th December, 1925, the Superintendent says:—

"It appears from the evidence given under oath before me, with regard to the transactions represented by the said policies, that in cases where the insured entrusted his business to the care of the agent or company, without special inquiry as to the rate of premium to be paid, he was charged a higher rate of premium than in the case in which the insured 'bargained' for a better premium rate."

In the certificate given by the Superintendent to this Court, he says that he bases his "opinion in making the said order" upon, *inter alia*, "my examination of certain witnesses . . . under oath . . ." and he quite properly transmits the evidence so taken to this Court for use in this appeal.

Under these circumstances, I decline to accept the statement or suggestion of counsel supporting the order that the Superintendent made up or may or could have made up his mind before hearing the evidence.

On hearing the attitude taken by the Superintendent in respect of the oral evidence, we decided to hear no argument upon the merits for the time being, but first to determine whether there should not be a new hearing irrespective of the facts which might seem to have been made to appear by the evidence.

The statute, by sec. 13(1), gives an appeal to this Court, and by sec. 13(3) provides that "the practice and procedure upon and in relation to the appeal shall be the same as upon an appeal from a judgment of a Judge of the Supreme Court, in an action."

Were this "an appeal from a judgment of a Judge of the Supreme Court, in an action," there can be no doubt that if the appellant so desired we would allow the appeal as of course, and send the case back for trial. I do not say a new trial, for a proceeding in which a judge called and examined all the witnesses himself, and declined to allow the defendant even to cross-examine the witnesses, would be a disgraceful travesty, not to be dignified by the name of "trial"—it would be a tyrannical and inexcusable denial of natural justice. It is argued, however, that we are precluded from this course by the case of *Local Government Board v. Arlidge*,

[1915] A.C. 120, which contains an interesting discussion of "natural justice," etc.

An examination of that case discloses that it has no adverse bearing upon the present appeal. By the Housing, Town Planning, etc., Act of 1909, 9 Edw. VII. ch. 44, sec. 17 (Imp.), it is made the duty of "every local authority" to prohibit "the use of" a "dwelling house for human habitation" on certain information—if the local authority refuse so to order an appeal is given—subsec. 6—to the Local Government Board. Section 39 provides that the procedure on an appeal to the Board "shall be such as the Board may by rules determine," with the provision—sec. 39(1)(b)—that no appeal shall be dismissed without a public local inquiry—the Board being given the power, or, if directed by the Court, the duty, of stating a special case for the opinion of the Court on "any question of law arising in the course of the appeal"—sec. 39(1)(a). The order of the Board—sec. 39(1)—is "binding and conclusive on all parties." Arlidge applied to the borough council to close a dwelling house; the council refused; he appealed to the Local Government Board; an inquiry was held by an inspector and attended by Arlidge and his solicitor, who adduced evidence in support of the appeal; the Board dismissed the appeal. Arlidge obtained an order *nisi* for a *certiorari*, on the ground that the proceedings of the Board were contrary to natural justice, in that (1) he had no opportunity of being heard by the Board, who in fact determined the appeal, and (2) the Board refused to disclose the report of the inspector upon which it acted: *Rex v. Local Government Board, Ex p. Arlidge*, [1913] 1 K.B. 463. The Divisional Court (Ridley, Lord Coleridge, and Bankes, JJ.) discharged the rule. Ridley, J., says:—

"There is no suggestion that any want of fairness or of equity characterised the hearing, which consisted of the consideration of facts and arguments, not indeed stated orally, but committed to paper."

Lord Coleridge, J., says (pp. 475, 476):—

"It is open to the Board to receive evidence in writing. They were given a discretion as to how they would receive evidence, and they have chosen written evidence. They were justified in so choosing. It is said that, because they have power to award costs, the proceeding must be a judicial inquiry in due form of law, which necessitates another meeting and fresh evidence before final determination. If there were any reason for saying that the process was contrary to natural justice, that might be an objection of some force; but to speak of these proceedings as a trial with all proper

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legal formalities is to misconceive the functions of an administrative department like the Local Government Board. I adopt the words of Wright, J., in *Rex v. Local Government Board*, [1911] 2 I.R. 331, at p. 347, as peculiarly applicable on this point. 'The Local Government Board,' said the learned Judge, 'in making these orders may be, and I assume are, making a judicial determination; but the Board is not a Court, with a Court list, and public sittings, publicly notified. They are a great central controlling body, and to apply to them the same tests and same considerations as would be properly applied to an ordinary judicial tribunal, seems to me completely to mistake their true position and functions.'

Bankes, J. (p. 479), adopts the language of Madden, J., in *Rex v. Local Government Board*, [1911] 2 I.R. 331, at p. 343, as follows:—

"The Local Government Board is one of several great administrative bodies who find themselves, in the course of administration, performing duties which this Court regards as judicial. . . . It is impossible to lay down any hard and fast rule as to the requirements of natural justice in such a case. It was never contemplated, and it would be unreasonable to hold, that a formulated procedure, such as that which has come into use in Courts of Justice, should be adopted. But the claimant should be given an opportunity of presenting his case to the Board in some way suitable to the character of the inquiry, and it would probably be in writing."

The Court of Appeal ([1914] 1 K.B. 160) allowed an appeal by a majority, Vaughan Williams and Buckley, LL.J.—Hamilton, L.J., dissenting. Vaughan Williams, L.J. (p. 181), thought that the question the Court had to determine was "whether the procedure on appeal before the Local Government Board had been so contrary to natural justice as that the judgment ought to be quashed and the appeal sent back to the Board to be determined in the manner provided by law," and he thought that it was. Buckley, L.J. (p. 185), lays it down broadly that the rules laid down by the Local Government Board for procedure in an appeal must be "rules consistent with natural justice." Hamilton, L.J. (pp. 203 and 204), did not think it the function of the Court "to advise the Local Government as to its procedure generally, or to criticise the procedure actually adopted as such."

In the House of Lords, *Local Government Board v. Arlidge*, [1915] A.C. 120, the learned Law Lords were unanimous.

Lord Haldane, L.C. (pp. 132 and 133), says:—

"Such a body as the Local Government has the duty of enforcing obligations on the individual which are imposed in the interests



of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board of Education v. Rice* he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But we went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus.

"My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure."

On p. 134, the Lord Chancellor continues:—

"What appears to me to have been the fallacy of the judgment of the majority in the Court of Appeal is that it begs the question at the beginning by setting up the test of the procedure of a Court of justice, instead of the other standard which was laid down for such cases in *Board of Education v. Rice*. I do not think the Board was bound to hear the respondent orally, provided it gave him the opportunities he actually had."

Lord Shaw of Dunfermline (at pp. 137 and 138) says:—

"The judgments of the majority of the Court below appear to me, if I may say so with respect, to be dominated by the idea that the analogy of judicial methods or procedure should apply to departmental action. Judicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. The department must obey the statute. For instance, in the present case it must hold a public local inquiry, and upon a point of law it must have a decision of the Law Courts. *Quoad ultra* it is, and, if administration is to be

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beneficial and effective, it must be the master of its own procedure. For it must always be borne in mind that its procedure if not in defiance of elementary standards—say, by hearing one side and refusing to hear the other—is simply the plan which it adopts to satisfy itself that the decision come to by a local authority was a good or a bad decision.”

Then later (p. 138) he adds:—

“ When a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. . . . But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of Justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term ‘ natural justice ’ means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the old ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous.”

Whatever that may mean, it does not mean that a Court of Justice to which an appeal has been given in express terms by statute is not to see to it that the tribunal from which the appeal is had gives those interested in a proceeding before it every reasonable opportunity to test the evidence adduced against them and of adducing evidence of their own.

Lord Parmoor (pp. 140 and 141) says:—

“ In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal. The general tests to be applied have been expressed in two cases which have come before this House, *Spackman v. Plumstead Board of Works* (1885), 10 App. Cas. 229, and *Board of Education v. Rice*, [1911] A.C. 179. In the earlier case of *Spackman v. Plumstead Board of Works* the question raised was whether the certificate of the superintending architect was conclusive in fixing the general line of building under the Metropolis Management Act, 1862. Lord Selborne, in the course of his opinion, states: ‘ No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but

he must give the parties an opportunity of being heard before him and stating their case and their views.' In the present case there are special provisions for procedure, and the Local Government Board have, in my opinion, given the parties a fair opportunity of being heard before them and stating their case and views."

And he concluded (p. 145) :—

"It appears to me that in the present case the respondent had every fair opportunity of bringing his case before the determining tribunal, and that he has no substantial ground for complaint."

Lord Moulton points out (pp. 148 and 149) that there was a public inquiry. "The respondent was represented on that occasion by his solicitor. He was called as a witness on his own behalf, and there is no question that every opportunity was given to him and to every other member of the public to bring forward any relevant matter at that inquiry."

I confess to my inability to understand that this *Arlidge* case, which, at every step and with almost every judicial utterance, stresses the fact that the appellant had every opportunity given him to present every fact, can be urged as an authority justifying us in saying that the Superintendent could properly refuse just such a right. So in *Hall v. Manchester Corporation* (1915), 113 L.T.R. 465, it is stated that the appellant did "not appear to have desired to call evidence" (p. 472); and, though the conduct of the respondents "may have been unsympathetic and the administration Draconian," there was no injustice.

In *Board of Education v. Rice*, [1911] A.C. 179, referred to with approval in the House of Lords on the *Arlidge* appeal, Lord Loreburn, L.C., speaking of the Board of Education, says (p. 182) :—

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such case the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything."

In *Cassel v. Inglis*, [1916] 2 Ch. 211, at p. 229, Astbury, J., speaks of the well-known rule that where "a tribunal is selected

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either by parties or by Parliament to deal with and adjudicate upon an existing and defined dispute *inter partes*, or to exercise a punitive jurisdiction on an alleged charge of misconduct whereby a man may be deprived of his property, the tribunal so set up must act in accordance with the ordinary rules of justice and fair-play and fairly listen to both sides."

The most recent case that I have seen is *Wilson v. Esquimalt and Nanaimo Railway Co.*, [1922] 1 A.C. 202, in which, as was said by Mr. Justice Duff giving the judgment of the Judicial Committee (p. 213):—

"The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might desire to urge against the view that the depositions produced in themselves constituted 'reasonable proof,' and they had the fullest opportunity also of supporting their contention that the depositions alone, in the absence of cross-examination, ought not to be sufficient, and that further time should be allowed to enable them to prepare their case."

Consideration of these cases but leads to the conclusion that is sufficiently obvious in the absence of authority.

The Superintendent in this investigation was not acting as a lawgiver who could say, *Sic volo, sic jubeo, sit pro ratione voluntas*. The law was made for him as for us. Nor was he acting in a political capacity, as, for example, a Minister advising the representative of the Crown in a matter of state policy, as in *Orpen v. Attorney-General for Ontario* (1924-5), 56 O.L.R. 327, 530. The lawgiver is answerable to the people, the Minister to the House and in the last resort to the people—the Court neither has nor desires control of or supervision over either.

Neither is he performing administrative work proper, departmental routine, in the doing of which he is responsible to his Minister and the Minister with his colleagues to the House.

When acting in such a case as the present, where the financial interests, the property rights, of the subject, may be affected, he is acting judicially, and if he does not act as he should, his actions may be called in question. We need, indeed, go no further than the statute itself, for that gives an appeal to this Court, which presupposes judicial action. Moreover, all question as to the applicability of *certiorari* proceedings has been wisely avoided by this provision—we have the simple case of the judgment of an inferior tribunal in appeal to this Court.

The maxim *Audi alteram partem* is as old as the Common Law itself and older. Quaint old Sir John Fortescue tells us, in *Bentley's Case* (1723), 1 Strange 557, at p. 567:—



"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee thou shouldst not eat? And the same question was put to Eve also."

*Cf. Abley v. Dale* (1850), 10 C.B. 62, 71; *Ex p. Ramshay* (1852), 18 Q.B. 173, 190; also Byles, J., in *Cooper v. Wands-worth Board of Works* (1863), 14 C.B.N.S. 180, at p. 194.

And custom, even immemorial custom, cannot avail against this rule: *Williams v. Lord Bagot* (1825), 3 B. & C. 772. Natural justice has not been discredited in fact or in terminology—the only effect of the striking language of Lord Shaw of Dunfermline, already quoted, being to warn Judges that there are more ways than one of giving natural justice and that they have not a monopoly.

Wholly acquitting the Superintendent of the hypocrisy and dishonesty suggested by the respondents' counsel, and crediting him with a sincere desire and conscientious effort to do his full duty, I must hold that his conduct violated every principle of fair-play, of natural justice. No doubt, he thought he was obtaining the actual facts from the witnesses: but every Judge and most lawyers know that it constantly happens that witnesses telling a plausible story with apparent candour are shewn by cross-examination to be utterly unreliable—that a perfectly honest and competent witness may give a wrong impression which may be corrected by a question or two—that perfectly honest and competent witnesses may be mistaken.

It will be intolerable if any one on such a farcical investigation could be allowed to determine the rights of any one.

I express no opinion as to the justice of the decision appealed from—I have not considered it—I have not the material.

The appeal must be allowed with costs payable by the Employers' Liability Assurance Corporation, who supported the order before us, and the case remitted for trial according to law.

LATCHFORD, C.J., agreed with RIDDELL, J.A.

MASTEN, J.A.:—I have had the opportunity of reading the judgment prepared by my brother Riddell, and I agree that the order of the learned Superintendent of Insurance must be set aside, and the matter remitted to him as proposed by my brother.

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The provisions of the Insurance Act which directly govern the question presently under consideration are as follows:—

Section 261 (as amended): “No rating bureau and no insurer authorised to transact the business of insurance within Ontario shall fix or make any rate or schedule of rates or charge a rate which discriminates unfairly between risks within Ontario of essentially the same physical hazards in the same territorial classification, or, if such rate be a fire insurance rate, which discriminates unfairly between risks in the application of like charges or credits or which discriminate unfairly between risks of essentially the same physical hazards in the same territorial classification and having substantially the same degree of protection against fire.”

262(1) (as amended): “The Superintendent may, on written complaint by an insurer or an insured that discrimination exists, give notice in writing to a rating bureau or insurer, requiring such rating bureau or insurer to file with the Superintendent any schedules of rates or particulars shewing how any specified rate is made up and any other information in connection therewith which he deems necessary or desirable.

“(2) Such rating bureau or insurer shall, within five days after the receipt of the notice, file with the Superintendent the schedules, particulars and other information required.

“(3) The Superintendent may, within thirty days after the receipt of the information required, make an order prohibiting any rate which, in his opinion, contravenes the provisions of section 261 and directing that the discrimination be removed.

“(4) The Superintendent shall forthwith deliver to the rating bureau or insurer a copy of such order and reasons therefor and shall cause notice thereof to be published forthwith in the *Ontario Gazette*.

“(5) No rating bureau or insurer shall remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it be made to appear to the satisfaction of the Superintendent that such increase is justifiable.

“(6) Any rating bureau, insurer or other person failing to comply with any provisions of such order shall be guilty of an offence.

“(7) Any order made under this section shall not take effect for a period of thirty days after its date and shall be subject to appeal within that time in the manner provided by section 13 of this Act and in the event of an appeal the order of the Superintendent shall not take effect pending the disposition of the appeal.”

Section 13: “(3) The practice and procedure upon and in

relation to the appeal shall be the same as upon an appeal from a judgment of a Judge of the Supreme Court, in an action."

Sections 261 and 262 occur in Part XIV. of the Insurance Act, and when all the provisions of that Part are read together it is plain that the Superintendent is thereby charged with a variety of duties some of which are plainly of an administrative or executive nature, to which the customary practice and procedure of the Courts does not apply, and in regard to which the method of procedure must be left to the sound discretion of the Superintendent himself. But I think that the learned Superintendent erred in extending that practice to an appealable contest arising under sec. 262.

In this case there is a complaint by an insurer and by an insured preferred against the appellant company. On that complaint the Superintendent is called upon to inform himself, to consider the complaint, to pronounce a decision or judgment, and to issue an order. Then, by sec. 13, his decision is subject to review in this Court, sitting not as *persona designata* but as a court; and "the practice and procedure upon and in relation to the appeal shall be the same as upon an appeal from a judgment of a Judge of the Supreme Court, in an action."

The result is that this Court is called upon to act judicially in the same manner as upon an appeal from a Judge of the Supreme Court. Among other things it is to pronounce such opinion on the rights of the contending parties as, in the opinion of this Court, ought to have been pronounced by the Superintendent. In other words, we are to affirm, reverse, or vary his order according to the opinion which, as a court, acting judicially, we form upon a consideration of the respective contentions and rights of the opposing parties. That makes it plain that we cannot as a court properly perform the duty imposed on us by the statute and ascertain the very right of the matter without having before us all the evidence relevant to the issues which either of the parties wishes to bring forward.

Further, as this is an appeal proper and not a rehearing, such evidence must in the first instance be adduced before the Superintendent.

This leads me to the conclusion that where the Superintendent is called upon to act and proceeds under sec. 262, he must afford both to the complainants and to the defendant company the opportunity of presenting their respective contentions and the evidence in support of them.

I deliberately express my opinion in those general terms, deeming it unnecessary and undesirable on this appeal to attempt to

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define more precisely the procedure to be adopted or the exact limits of the administrative and executive functions of the Superintendent. It suffices for the disposition of this appeal to say that this Court must have before it for the exercise of its functions whatever in the way of relevant evidence the appellant desires to present.

The statute is new, and in its interpretation the Superintendent may have been misled by the practice under analogous American statutes.

The Employers' Liability Assurance Corporation, who before us strenuously supported the order appealed from, should pay to the appellant company its costs of the appeal.

MIDDLETON, J.A., agreed with MASTEN, J.A.

*Appeal allowed.*

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[IN BANKRUPTCY.]

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Feb. 23.

*Bankruptcy—Appointment of Interim Receiver—Undertaking of Petitioning Creditor as to Damages—Injury to Goods of Debtor while in Hands of Interim Receiver—Inquiry as to Damages—Bankruptcy Rule 86—Discharge of Interim Receiver—Effect of—Jurisdiction of Court on Bankruptcy Side—Evidence—Onus.*

An order in Bankruptcy appointing an interim receiver contained an undertaking by the petitioning creditor to abide by any order as to damages which the Court might make in case it should be of opinion that the debtor had sustained any by reason of the order which the petitioning creditor ought to pay and to be responsible for the due performance of his duty by the interim receiver. The interim receiver took possession, and carried on the debtor's business for about a month. He reported that there were no assets. A receiving order was made but not issued, and no further proceedings were taken upon the petition. An order was made discharging the interim receiver. The debtor complained that while the interim receiver was in possession, an automobile owned by the debtor was damaged, and asked (under Bankruptcy Rule 86) for an order directing an assessment and payment by the petitioning creditor of the damages sustained:—

*Held*, that the petitioning creditor was not released from his undertaking by the discharge of the interim receiver, and that the Court, on its Bankruptcy side, had jurisdiction to make the order asked for. The onus was upon the debtor to make out a *prima facie* case for damages; he had satisfied that onus; and there should be an order directing the trial of an issue to determine whether the debtor had sustained any damages, and, if he had, the amount thereof.

MOTION by John Jackson, the debtor, for an order directing an assessment of the damages alleged to have been sustained by him

owing to the negligence of an interim receiver appointed on the petition of one Shier, a creditor.

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The motion was heard by FISHER, J.

*S. H. Bradford*, K.C., for the debtor.

*J. M. Bullen*, for the petitioning creditor.

February 23. FISHER, J.:—By order dated the 19th September, 1925, on the application of George A. Shier, Edgar T. Read, of Sault Ste. Marie, Ontario, was appointed interim receiver of the property of the debtor and empowered to take immediate possession of his property and to carry on the business of the debtor in the ordinary course until Shier's petition for a receiving order came on to be heard. The order contained the usual undertaking by the petitioning creditor, "to abide by any order as to damages which the Court may make in case it should hereafter be of the opinion that the debtor shall have sustained any by reason of this order which the applicant ought to pay, and also to be responsible for the due performance of his duty by the interim receiver."

The interim receiver took possession and carried on the business for about a month, and, upon his reporting to the petitioning creditor that there were no assets for distribution among the unsecured creditors, a receiving order was made but not issued, and no further proceedings were taken under the petition. Thereafter the interim receiver served a notice of motion on the debtor notifying him that he would, on a date named in the notice, apply to the Court for his discharge as receiver. The debtor did not attend on the return of the motion, and an order was made discharging the receiver and directing him to deliver the assets to the debtor, which was done. The present motion was then launched.

The debtor asserts that during the period the interim receiver was in possession a valuable automobile owned by him was damaged to the extent of about \$2,000, and contends that he is entitled to an order directing the trial of an issue to determine the liability, if any, of the petitioning creditor to the extent of any loss he (the debtor) has sustained. The petitioning creditor admits that damage was done to an automobile of the debtor to the extent of between \$400 and \$500, but contends that there is no liability on his part to pay for the same.

The application is opposed by the petitioning creditor, on the grounds that the order discharging the receiver released the petitioning creditor from any liability on his undertaking, and



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that the debtor must proceed against the petitioning creditor for his damages in a court outside of the Bankruptcy jurisdiction.

There is no doubt the petitioning creditor acted *bonâ fide* and that the debtor was an insolvent within the meaning of the Bankruptcy Act. The debtor did not dispute the petitioning creditor's debt; and, considering the character of the debtor's business, it was not an abuse of the Court's process for the petitioning creditor to apply for the appointment of an interim receiver so as to protect the assets of the estate until a receiving order was made, and a custodian appointed.

The two main points for determination are: Was the petitioning creditor released from his undertaking when the interim receiver was discharged by an order of the Court; and, if not, is the debtor entitled to have any damages he claims to have suffered assessed by the Court?

If the petitioning creditor was not released, I cannot see any reason why the debtor should not be entitled to have the Court determine the liability and damages, but at the same time there may be little, if any, advantage to the debtor even should he succeed, because if it be found that he is entitled to damages, the petitioning creditor would claim the right to set off these damages against the debtor's indebtedness to him. The debtor, however, contends that any sum he might recover would reduce his general liabilities, and for that reason he desires to proceed with the trial of an issue.

I am unable to find any Bankruptcy cases in our own Court where a debtor applied to have his damages assessed on the undertaking of a petitioning creditor, and under the English Act such applications are rarely made. In fact, the only case I have been able to find that has any bearing is *In re A. B. & Co. (No. 2)*, [1900] 2 Q.B. 429, and 16 Times L.R. 365, and that case, after being partly heard, was abandoned.

The undertaking in the order under which the interim receiver was appointed specially provides for any damages the debtor may sustain, as well as the proper performance by the receiver of his duties as such. When the debtor was served with a notice of motion for an order discharging the interim receiver, he might very well have concluded that the motion referred to the receiver's accounting for all moneys received and disbursed while he was in possession, and with that he was content, but as to his claim for damages it always was his intention to look to the person at whose instance the receiver was appointed, and for whom he acted. Undertakings in injunction proceedings remain in force notwithstanding the dismissal of the action: see *Newby v. Harrison*

(1861), 3 DeG. F. & J. 287; or its discontinuance: see *Newcomen v. Coulson* (1878), 7 Ch.D. 764. And when a plaintiff who has applied for and obtained an injunction fails, the defendant is entitled to an inquiry as to the damages sustained. See *Ross v. Buxton*, [1888] W.N. 55.

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The petitioning creditor in these proceedings, by his undertaking in the order, undertook to abide by any order as to damages which the Court might make in case it should be found that the debtor was entitled to damages.

The practice adopted where injunctions are dissolved in actions in a court having jurisdiction other than that of Bankruptcy, is to grant an inquiry as to damages if under all the circumstances the damages are not trivial or remote, and it is a case which, in the discretion of the Court, having regard to all the circumstances, damages ought to be given.

If the debtor was claiming damages because the receiver had conducted the business whilst he was in possession at a loss, he would not be entitled to any relief, as the acts of a receiver, in running the business to the best of his ability, are the acts of the Court. See *Peruvian Guano Co. v. Dreyfus Brothers & Co.*, [1892] A.C. 166, and Mayne on Damages, 6th ed., p. 421.

But that is not this case. Here the debtor alleges that he suffered damage, in respect of one of his valuable automobiles, to the extent of \$2,000, caused by the negligence of the receiver, or by those who were in his employment. The onus is on the debtor to shew that under the circumstances he has a *prima facie* case for damages, in order to justify the Court in making an order; and I am of opinion that he has done so, and that the undertaking given by the petitioning creditor remained in force notwithstanding the order discharging the receiver, and also that the application for the order asked should be made to the court in which the undertaking was given and the receiver appointed, and not, as contended by the learned counsel for the petitioning creditor, by the bringing of an action against him in a court outside of Bankruptcy. See *Searle v. Choat* (1884), 25 Ch.D. 723.

The law is that if a debtor has been prejudiced by the conduct of a receiver he is entitled to relief and damages, but his damages must be confined to the loss which is the natural consequence of the appointment.

Counsel representing the petitioning creditor also contended that an order could not be made because the receiver was in possession for the benefit of all the creditors, but I fail to see how that is any answer on the present application, because this is a case of alleged malfeasance by an interim receiver, for whom the

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 1926. it is only when a receiving order is made that the receiver is acting  
 RE for the benefit of all the creditors. See *In re Wells* (1890), 45  
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The debtor's application is based on Rule 86\* of the Bankruptcy Act, and an order will go directing the trial of an issue by the Judge of the District Court at Sault Ste. Marie, Ontario, to ascertain and state whether the debtor has sustained any damages and the amount for which the petitioning creditor is answerable, and reserving further consideration until after the report of the Judge of the District Court.

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[APPELLATE DIVISION.]

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RE BLUEBIRD CORPORATION LTD.

March 5.

*Company—Subscriptions for Shares — “Subscribers’ Agreement” — Dominion Companies Act, R.S.C. 1906, ch. 79, secs. 51 (sec. 3 of 7 & 8 Geo. V. ch. 25), 9, 10, 11, 13 (sec. 5 of Amending Act) — Whether Subscribers Liable as Shareholders—Failure to File Prospectus or Statement in Lieu of—Sec. 43C.(1) of Act (sec. 7 of Amending Act)—Whether Allotment (if Made) Void—Effect of Breach of Law—Absence of Application for Shares.*

A syndicate acquired from companies in the United States certain rights and proposed to organise a company with a Dominion charter to manufacture machines in accordance with the rights acquired. Persons intending to become shareholders in the proposed company signed and sealed a document, which, after recitals, read as follows: “We, the undersigned, do hereby severally covenant and agree each with the other and with the syndicate . . . to become shareholders in a company to be incorporated under the provisions of the first part of the Companies Act,” R.S.C. 1906, ch. 79, “under the name . . . with an authorised capital of \$1,000,000, divided into 10,000 shares of \$100 each; and we do hereby severally, and not one for the other, subscribe for and agree each with the other and with the members of said syndicate to take the respective amounts of the capital stock of said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.” This agreement was not sent to the Secretary of State's department at Ottawa. What was sent was an application in form A in the schedule to the Dominion Companies Act, with the names of the members of the syndicate only. A memorandum of agreement in form B was also sent, with the names of the members of the syndicate only. Letters patent were in Feb-

\* Where, after an order has been made appointing an interim receiver, the petition is dismissed, the Court shall, upon application to be made within 21 days from the date of the dismissal thereof, adjudicate with respect to any damages or claim thereto arising out of the appointment . . . and shall make such order as the Court thinks fit.

ruary, 1920, issued thereon constituting the members of the syndicate "and all others who may become shareholders in the said company a body corporate and politic by the name," etc. Notice of the granting of the letters patent was duly given pursuant to sec. 13 of the Companies Act, as enacted by (1917) 7 & 8 Geo. V. ch. 25, sec. 5:—*Held*, having regard to the provisions of secs. 5(1) (sec. 3 of 7 & 8 Geo. V. ch. 25), 9, 10, and 11 of the Act, that the persons who signed the "subscribers' agreement" were not "subscribers to the memorandum of agreement," within the meaning of sec. 13, and were not shareholders by statute.

*In re Nipissing Planing Mills Ltd.* (1909), 18 O.L.R. 80, approved.

*In re London Speaker Printing Co., Pearce's Case* (1889), 16 A.R. 508, followed.

No prospectus or statement in lieu of prospectus was ever filed; the directors apparently regarded the acceptance by the company of the assignment by the syndicate of the "subscribers' agreement" as equivalent to an allotment:—

*Held*, assuming an allotment, that it was ineffective to charge the respondents, four persons who had signed the "subscribers' agreement," there having been no prospectus or statement in lieu of prospectus filed before the allotment, as required by sec. 43C.(1) of the Act, as enacted in 1917 by 7 & 8 Geo. V. ch. 25, sec. 7.

*Per* LATCHFORD, C.J., and RIDDELL, J.A.:—The rule that no one can have the assistance of the Court in an attempt to place himself in better legal position by breaking the law was applicable.

*Per* MIDDLETON and MASTEN, J.J.A.:—There was no application by the respondents for shares, and no contract was shewn.

Review of the authorities.

APPEALS by the trustee of the insolvent estate of the corporation from judgments of LOGIE, J., upon issues directed in bankruptcy proceedings, in favour of Frederick H. Gott, Ernest Moule, Martin W. McEwen, and Joseph Lipovitch, alleged to be subscribers for shares, exonerating them from liability as contributories.

February 1 and 2. The appeals were heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

W. N. Tilley, K.C., and W. K. Fraser, for the appellant, argued that sec. 13 of the Dominion Companies Act made the respondents shareholders without any application or allotment, because they were signatories to the subscription agreement of the 5th January, 1921. Counsel urged that if a person who had not signed the memorandum of agreement sent to Ottawa with the application for incorporation, should sign the duplicate thereof returned from Ottawa, this would constitute him a shareholder; and, if that were so, the signing of the subscription agreement would have the same effect: *Martin v. Clarkson* (1925), 57 O.L.R. 499; *Alberta Rolling Mills Co. v. Christie* (1919), 58 Can. S.C.R. 208. Apart from the statute, the respondents were bound by contract to become shareholders. The subscription agreement was a continuing application for shares, entrusted to

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the syndicate for delivery to the company after its incorporation, and the allotment to them, which was by conduct, was acceptance: Buckley's Companies Acts, 10th ed., p. 57.

*W. S. Brewster*, K.C. and *J. L. Sutherland*, for the respondents, argued that they did not become shareholders by statute, because the subscription agreement was never filed at Ottawa, and so did not become a part of the application for incorporation; and the respondents had not signed the memorandum of agreement referred to in sec. 13 of the Companies Act which was filed on the application for incorporation: *In re Nipissing Planing Mills Ltd.* (1909), 18 O.L.R. 80; *Canadian Druggists' Syndicate Ltd. v. Thompson* (1911), 24 O.L.R. 108; *Re Sun Ray Manufacturing Co. Ltd.* (1924), 26 O.W.N. 287, 27 O.W.N. 176; *Vilandre v. Allie* (1915), 22 D.L.R. 577. There had been no allotment; but, even if there had been, the respondents were not charged, as no prospectus had been filed: *Repetti Ltd. v. Oliver-Lee Ltd.* (1922), 52 O.L.R. 315. Answering the appellant's contention that the respondents were bound by contract to take the shares, counsel contended that there was no privity of contract between the respondents and the company, because, at the time of the signing of the subscription agreement, the company was not in existence: *In re London Speaker Printing Co., Pearce's Case* (1889), 16 A.R. 508, 512. The syndicate had not been authorised to act as agent of the subscribers to apply to the company on their behalf for shares, and therefore there had never been an application by the respondents for shares: *Re Carpenter Ltd., Hamilton's Case* (1916), 29 D.L.R. 683; *Consumers Cordage Co. Ltd. v. Molson* (1912), 2 D.L.R. 451.

*Tilley*, K.C., in reply, cited *Premier Briquette Co. Ltd. v. Gray*, [1922] Sess. Cas. 329; *In re Olympic Fire and General Reinsurance Co. Ltd.*, [1920] 1 Ch. 582, [1920] 2 Ch. 341.

March 5. RIDDELL, J.A.:—Appeals from the judgments of Mr. Justice Logie in four issues concerning the liability of alleged shareholders in an incorporated company now in bankruptcy.

The appeals were argued together with great care and skill; the points involved are of considerable importance; and the amount of money at stake is by no means insignificant.

The facts are not very involved. Taking the evidence and the findings of the learned trial Judge, the following appears:—

A syndicate called "The Bluebird Syndicate" was formed in the summer of 1919 to acquire for Canada and the rest of the British Empire the right to manufacture certain electric washing machines made in St. Louis. It was composed of J. B. Detwiler, W. J. Verity, Thomas Hendry, since deceased, Roy E. Secord,

Walter C. Boddy, W. T. Henderson, all of Brantford, Ontario, and P. E. Verity of Batavia, New York. This syndicate organised a group of business and professional men in Brantford, and in the autumn of 1919 went to St. Louis, the home of the Blue Bird Manufacturing Company of St. Louis, the company manufacturing these machines in the United States. They spent two days there with the idea of forming a company to operate in Canada; of the four persons involved in these appeals, Moule and Gott went with this party, while McEwen and Lipovitch did not.

The manufacturing company disposed of their output through another company called "The Blue Bird Appliance Company."

The syndicate entered into an agreement with the manufacturing company, manifested by a document (exhibit 21), duly signed and sealed, which provided for the formation of a Dominion of Canada company with a capital of \$1,000,000, and for the conveyance to such company of their rights under the agreement.

It was recited that it was intended that the Dominion company should enter into a contract with the Blue Bird Appliance Company for the sale of its product in the Dominion of Canada, and that it was intended that the agreement with the two American companies should be "interdependent to the extent that this contract shall come into force and effect on the execution of the contract between the parties of the first part and the Blue Bird Appliance Company, covering the sale by the Blue Bird Appliance Company of the devices to be manufactured by the parties of the first part or by the company to be formed by them."

A document (exhibit 22) was also drawn up between the syndicate and the Blue Bird Appliance Company, reciting the intention of the syndicate to enter into the agreement with the manufacturing company—and also, "And it is now further recited that the parties to this contract are desirous of having the Blue Bird Corporation Limited, when formed, and the Blue Bird Appliance Company Limited of Canada, when formed, to enter into a similar contract as now exists between the Blue Bird Manufacturing Company of Delaware and the Blue Bird Appliance Company of Missouri, concerning the sale of household devices for the Dominion of Canada."

The document goes on to provide that the Dominion company to be formed should sell and the appliance company should "buy and receive and pay for within one year from and beginning on the first day of July, 1920, thirty thousand (30,000) Blue Bird electric clothes washers of the same design, material and workmanship as said clothes washers now manufactured with such im-

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The price of the machines was provisionally fixed at \$80 each—which meant, of course, an assured receipt of \$240,000 in the first year. This document was executed by the appliance company, but not by any member of the syndicate except Detwiler—the other members of the syndicate were later advised by Mr. Henderson not to sign it and did not sign it at any time.

In January, 1920, a document was drawn up called the "subscribers' agreement" (exhibit 1), which, after reciting the manufacture by the St. Louis company of the household devices, the sale of the product by the appliance company, the formation of the syndicate, that "it is proposed to incorporate and organise a company to engage in the manufacture of electrically operated household devices for the Dominion of Canada and the British Empire, under the trade marks, patents and designs of the Blue Bird Corporation of St. Louis, Mo.," proceeded as follows:—

"A contract has been entered into between the syndicate and the Blue Bird Manufacturing Company of St. Louis by which the syndicate has acquired for the Dominion of Canada and the British Empire the exclusive right to manufacture and deal in Blue Bird household devices which have been developed and marketed in the United States by the American company, together with the trade marks, trade names, patents and designs of the Blue Bird Corporation.

"The syndicate has contracted to organise a manufacturing company which will manufacture, within a period of one year from the 1st of July, 1920, 30,000 electric clothes washing machines of the Blue Bird design.

"The syndicate has also entered into a contract with the Blue Bird Appliance Company of St. Louis by which that company has contracted to purchase 30,000 electric clothes washing machines during the period of one year from the 1st of July, 1920, and to pay cash for same at the factory of the Canadian company to be incorporated, which contract also covers the right of purchase by the Blue Bird Appliance Company during succeeding years of the entire output of the proposed company in gradually increasing quantities.

"The contract with the Blue Bird Appliance Company also provides for the exclusive sale to it of other appliances of which the proposed company shall undertake the manufacture in pursuance of the terms of its contract with the Blue Bird Manufacturing Company."

It was also recited that "the members of the syndicate have subscribed the sum of \$20,000 each and have undertaken to provide the capital required to insure the successful operation of the company and the performance of its contract for the manufacture of 30,000 washing machines during its first year of operation."

Then it is added: "The syndicate proposes to incorporate a company to be known as 'The Blue Bird Corporation Limited,' which will acquire the assets of the syndicate and which will manufacture Blue Bird appliances for Canada and the British Empire. This company will be incorporated with an authorised capital of \$1,000,000, of which it is intended to issue the sum of \$700,000, which it is calculated will be sufficient to enable the company to carry out its programme and afford the necessary equipment and capital therefor. It is to be observed that from the manufacturing standpoint the proposition is one of production. The article to be turned out is made in only one size, and each machine is a duplicate of the other, making an ideal manufacturing proposition."

Then comes the agreement:—

"We, the undersigned, do hereby severally covenant and agree each with the other and with the syndicate herein named to become shareholders in a company to be incorporated under the provisions of the first part of the Companies Act (chapter 79 of the Revised Statutes of Canada 1906), under the name of 'Bluebird Corporation Limited' or such other name as the Secretary of State may give to the company, with an authorised capital of \$1,000,000, divided into 10,000 shares of \$100 each; and we do hereby severally, and not one for the other, subscribe for and agree each with the other and with the members of said syndicate to take the respective amounts of the capital stock of said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.

"In accordance with and upon the terms of their agreement referred to herein, the members of the syndicate hereby subscribe for the sum of \$20,000 each, making a total of \$140,000; and it is understood and agreed that further subscriptions made by the members of the syndicate are in addition to said subscriptions and upon the same terms as other subscribers hereto.

"All subscriptions shall be payable in four equal quarterly instalments on the first days of February, March, April, and May respectively."

It is alleged by the appellant that the four respondents signed

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App. Div. (with a seal as well) a list, part of this "subscribers' agreement,"  
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This "subscribers' agreement" was not sent to Ottawa, but an application in form A in the schedule to the Dominion Act was sent with the names of the members of the syndicate only. A memorandum of agreement in form B in the schedule to the Act was also sent with the names of the members of the syndicate only inserted.

Letters patent were issued thereon on the 3rd February, 1920, constituting the said seven persons "and all others who may become shareholders in the said company a body corporate and politic by the name of 'Blue Bird Corporation Limited.'" Notice of the granting of letters patent was duly given pursuant to sec. 13 of the Companies Act, R.S.C. 1906, ch. 79, as enacted by (1917) 7 & 8 Geo. V. ch. 25, sec. 5.

I pause here to consider the argument pressed upon us by Mr. Tilley that this section makes, "from the date of the letters patent, the persons therein named and such persons as have become subscribers to the memorandum of agreement, or who thereafter become shareholders in the company," a body corporate.

The argument is that the persons who signed the "subscribers' agreement" were "subscribers to the memorandum of agreement," within the meaning of this section.

This, however, cannot be. The Act, by sec. 5(1) (sec. 3 of 7 & 8 Geo. V. ch. 25), provides for the Secretary of State granting a charter "to any number of persons, not less than five, who apply therefor, constituting such persons, and others who have become subscribers to the memorandum of agreement hereinafter mentioned and who thereafter become shareholders in the company thereby created, a body corporate and politic."

The memorandum of agreement is thereafter mentioned in sec. 9, which provides that the application for a charter "shall be accompanied by a memorandum of agreement in duplicate under seal . . . in accordance with form B." Sections 10 and 11 again refer to this memorandum of agreement.

Section 13 (after providing for the notice of granting the charter) makes (1) the persons named in the charter, (2) the signatories of "the memorandum of agreement," and (3) those who thereafter become shareholders, a body corporate and politic—"their successors" constitute a sub-species of class (3).

The words "memorandum of agreement" mean the same thing throughout. "It is a sound rule of construction to give the same meaning to the same words occurring in different parts

of an Act of Parliament:" *Courtauld v. Legh* (1869), L.R. 4 Ex. App. Div. 126, *per* Cleasby, B., at p. 130.

The intention is obvious: a memorandum of agreement and stock book, in form B, is executed under seal in duplicate; some persons not less than five make application for a charter (as will shortly appear they will be of those who have signed the "memorandum of agreement and stock book"), in form A, which contains the statement that "a stock book has been opened and a memorandum of agreement by the applicants under seal . . . has been executed in duplicate, one of the duplicates being transmitted herewith." (It is of no importance here that the statute expressly provides for a memorandum in duplicate being sent with the application, while form A and form B provide for one duplicate only to be so sent).

On the receipt of the two documents, the Secretary of State may grant a charter to these applicants. The effect of this charter, after proper notice, is to make not the applicants alone but the applicants "and others who have become subscribers to the memorandum of agreement" a body corporate, into which may come those who thereafter become shareholders.

The printed form of charter contemplates the inclusion of the names of all those in the memorandum of agreement, but there is no need of this—if any names be omitted by accident or design the bearers thereof are not excluded from the corporation. Whatever the form of the letters patent, the statute is imperative; and an Act of Parliament may do anything not naturally impossible. If the "subscribers' agreement" had been sent to the Secretary of State and accepted as the "memorandum of agreement and stock book," form B, it would be *nihil ad rem* that the names of only members of the syndicate appear in the charter—the other signatories would, by virtue of the statute, be part of the corporation. And in that case all allegations of fraud would be immaterial.

But this was not done—a memorandum of agreement was sent to the Secretary of State, but not the "subscribers' agreement" (exhibit 1); it was consequently the signatories to that memorandum, not those to exhibit 1, who became the corporation.

This is just such a case as *In re Nipissing Planing Mills Ltd.*, 18 O.L.R. 80, under similar provisions in the Ontario Act of 1897—and my Lord, then a trial Judge, held that the signatory was not a shareholder by statute. See also *In re London Speaker Printing Co.*, *Pearce's Case*, 16 A.R. 508, 512.

Resuming the narrative—the first meeting of the shareholders was held on the 6th February, 1920, the seven of the syndicate

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being present—as is stated in the minutes “being all the shareholders of the company”—the seven were elected directors. Then the directors met, and the following took place:—

“A contract made between John B. Detwiler *et al.* and this company to provide for the acquiring by this company of the real and personal property known as Plant No. 1 of Motor Trucks Limited and consisting of the lands and buildings, machinery and equipment, miscellaneous supplies, dies, tools, and office furniture more particularly set forth in said agreement and in schedule A thereto, also providing for the assignment to this company of certain contracts between the said parties and Blue-Bird Manufacturing Company of St. Louis, Missouri, and of a further contract between the said parties and the Blue Bird Appliance Company of St. Louis Missouri; also providing for the assignment to this company of a certain memorandum of agreement bearing date the 5th day of January, 1920, made between said parties therein described as a syndicate and the persons whose names are subscribed thereto, and providing for subscriptions to the capital stock of this company, and providing further for the acquirement by this company of all other contracts and property of the syndicate as such, was presented, and it was moved by Mr. W. J. Verity, seconded by Mr. W. C. Boddy, that the same be approved and adopted and that the president and secretary be authorised to execute the same on behalf of the company and to attach the company’s seal thereto.”

The shareholders’ meeting, then resumed with the seven, “being all the shareholders of the company,” confirmed certain by-laws and passed a resolution “that the contracts referred to in the minutes of the directors’ meeting just held be and the same are hereby adopted, sanctioned, and confirmed by this company.”

The contract by Detwiler referred to provides for the transfer to the new company of (1) certain real estate; (2) buildings and equipment thereon; (3) the contract with the Blue Bird Manufacturing Company of St. Louis, exhibit 21; (4) that with the Appliance Company, exhibit 22; (5) the “subscribers’ agreement,” exhibit 1; and (6) all and any other contracts, rights, etc., of the . . . syndicate.

No prospectus or statement in lieu of prospectus was ever filed as mentioned in the Act; there was no by-law as contemplated by sec. 46—there was no formal allotment till long after, but the directors seem to have considered the acceptance by the company of the assignment by the syndicate of the “subscribers’ agreement” equivalent to an allotment.

We have not here to deal with an actual issue of shares paid

for and accepted—to which the maxim *Quod fieri non debet factum valet* might apply. I mean we are not dealing with such a case as that of Gott, who accepted and paid for \$2,000 par value of stock—and most of the remarks following are not to be considered applied to such a case.

The directors contended and the appellant contends that what was done was equivalent to an allotment and that the four subscribers are liable to pay the amount of their subscriptions.

It becomes necessary to determine the question whether, assuming an allotment, such an allotment was effective to charge the respondents, there having been no prospectus or statement in lieu of prospectus.

The statute is express—sec. 43C.(1) (14 & 15 Geo. V. ch. 33, sec. 14): “A company shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the Secretary of State of Canada either a prospectus or a statement in lieu of prospectus, in the form and containing the particulars set out in form F in the schedule to this Act, signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing.”

The statute of 1924 was not in force at the time of the transactions in question herein, and if it should be construed as not governing them, then sec. 43C of the principal Act as enacted by (1917) 7 & 8 Geo. V. ch. 25, sec. 7, will govern. It will be seen that it has the same effect in the present instance, as the company did not issue a prospectus or file a statement in lieu of prospectus.

The section enacted in 1917 is as follows: “43C.(1) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the Secretary of State of Canada a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in form F in the schedule to this Act.”

This is taken substantially from sec. 82 of the Companies (Consolidation) Act, 1908 (Imp.) The last word has not been said in the English courts in respect of allotment in violation of this section—the latest is somewhat disturbing, the learned Lords not being unanimous, and two of great eminence expressing diametrically different opinions. It is true that the opinions were

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In *Jubilee Cotton Mills Ltd. (Official Receiver and Liquidator) v. Lewis*, [1924] A.C. 958, the company, before filing a statement in lieu of prospectus, allotted certain shares and debentures to a promoter, Lewis (the vendor); the pretence was that they were consideration for the purchase, but in reality they were to provide for promotion profits; he sold them and made a profit; the liquidator proceeded against him on a misfeasance summons; he pleaded that they were a nullity, the allotment being in the absence of a statement. Astbury, J. (*In re Jubilee Cotton Mills Ltd.*, [1922] 1 Ch. 100, at p. 118), referred to the *dicta* of Warrington, J., and Swinfen-Eady and Phillimore, LL.J., in *In re Blair Open Hearth Furnace Co.*, [1914] 1 Ch. 390, that such an allotment was void, but (p. 119) did not think it necessary to decide the point and decided that in any case the net money received for the shares and debentures should be paid to the company. In appeal ([1923] 1 Ch. 1), Warrington, L.J. (p. 24), said: "I . . . venture to adhere to and repeat as my opinion in the present case that the allotment of debentures and shares . . . was illegal and void"—and he made this his *ratio decidendi*. Younger, L.J., referring to this opinion, says (p. 40): "I also wish to add, that with Warrington, L. J., I am of the opinion that the claim against Lewis fails also on the ground that the issue of the shares and debentures in the present case was entirely void for the reasons given by him. I so entirely agree with the reasoning of the Lord Justice on that subject that I do not deem it fitting further to prolong my judgment by giving my reasons in my own words."

Lord Sterndale's decision will be referred to later.

In the House of Lords ([1924] A.C. 958), Lord Dunedin (pp. 969, 970) says:—

"The second question was that in terms of sec. 82 no allotment may be made by a company which has not issued a prospectus unless there has been filed with the registrar a statement in lieu of a prospectus, and the statement in this case was admittedly not filed till after the date of the allotment.

"On this point, although it was not necessary for decision, we have the opinion of Warrington, J., and Swinfen Eady, L.J., in *In re Blair Open Hearth Furnace Co.*, that the result is that any allotment is void.

"I agree with the opinions, and particularly with that of Swinfen Eady, L.J., who says he considers the matter settled by the case of *Whiteman*, [1910] A.C. 514, in this House. He quotes some

remarks made by myself in that case, but I wish to add that the same thing, though in somewhat shorter form, was said by Lord Macnaghten. I am, therefore, of opinion that the respondent does make out the first point—namely, that the allotment was a bad allotment. The result would doubtless be that any one holding such allotment could have resisted successfully being put on the list of contributors in the list of liquidation.”

Lord Sumner (pp. 975, 976) says:—

“My Lords, as to the second point, I think that sec. 82 does forbid the company to do what those, who then manipulated it, caused it to purport to do on January 6, but I cannot see that the company is therefore entitled, as was suggested, to treat this allotment now as voidable. Whatever possibility there may be of saying that, in the case of a natural person, a statutory avoidance of his liability is one which he need not insist upon unless he chooses, the same cannot be predicated of artificial persons in the same measure, if at all. Section 82, subsec. 1, is couched in the terms of a categorical imperative and constitutes a restriction upon the company's legal capacity for action. An artificial person is the creation of the law; how can it elect to do what its creator says it shall not do at all? It has no free will; no power of its own to obey or disobey. Nor, again, is this restriction imposed simply for the benefit or protection of the company. It would appear that members of the public, likely to be led to deal with the company, are also entitled to the benefit of the section and are intended to enjoy the means of knowing what purports to be the condition of the company's affairs, even though it be inaccurate (*In re Blair Open Hearth Furnace Co.*), before they can become bound to it by a purported allotment of its shares. If so, the company cannot treat as merely voidable something which, in the interest of strangers, as well as of itself, the Act has forbidden to be done. . . .

“On examination of the Act of 1908 it appears to me, with all respect to Warrington, L.J., who thought otherwise, that the allotment of January 6 was not *ultra vires* altogether. The company had then been incorporated, and as such was capable of allotting its shares, unless its capacity in that regard is taken away. I do not think that the prohibiting words of sec. 82, subsec. 1, take away the company's capacity. They only prohibit its exercise.”

The learned Law Lord concludes (p. 977): “For the reason given above, I think that the action of Mr. Lewis, particularly on January 6, involved the company in at least a potential liability to recognise these shares, which constituted for Mr. Lewis a pro-

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moter's profit of value, though no consideration for them was received by the company, and, the same thing applying to the debentures, I think he must give up his gains as to both."

The result was that the appeal was allowed—Lord Sumner apparently going on the ground of estoppel, the company being estopped *quoad* the public from saying that the stock and debentures were absolutely void—and all agreeing that in any case Lewis received money which he must account for to the company.

But even Lord Sumner's opinion should be read in connection with the facts—the company, having put out certain stock and securities as valid, for the protection of those who might be induced to buy, could not be allowed to repudiate them entirely. This lends no support to the proposition that a company can, by doing something forbidden by law, place itself in a better position—stock it has issued it may not repudiate, but that does not imply that it may by a forbidden allotment compel an unwilling subscriber to take stock or to pay for it.

It will be well to examine the English cases further.

The first case is the well-known *In re Blair Open Hearth Furnace Co.*, [1914] 1 Ch. 390. Warrington, J., says (p. 400): "I am inclined to agree with that argument to this extent, that if no statement at all is filed, then, inasmuch as no consequence is imposed by the Act as the result of a failure to file the statement, it must be taken that the statute prohibits the company from proceeding to an allotment of shares and that any allotment of shares would accordingly be illegal." But this was *obiter*, as a statement had been filed.

In appeal Cozens-Hardy, M.R., did not pass on the point; Swinfen-Eady, L.J., says (pp. 408, 409): "It is simple enough here where in terms the statute prohibits a company from allotting shares where a statement in lieu of prospectus has not been filed. Therefore, with regard to the second point made by Mr. Gore-Browne, that there was nothing in the statute to render the allotment invalid, I am of opinion that if no statement had been filed the allotment would have been invalid." Phillimore, L.J., says (p. 412): "I accept the argument of the appellants that the effect of sec. 82 is to make an allotment of shares or debentures by a company which is not a private company, and which does not issue a prospectus and does not file a statement in lieu of prospectus, not voidable but void." Again these expressions are *obiter dicta*.

The result is that we find *obiter dictum* of Warrington, J., but made *ratio decidendi* by him as Lord Justice; *obiter dicta* of Astbury, J., Swinfen-Eady and Phillimore, L.L.J., and of Lord Dune-

din, that such an allotment is void: and a *ratio decidendi* of Younger, L.J., to the same effect—while on the other hand we have only an *obiter dictum* of Lord Sumner that the company cannot be allowed to say that stock and debentures actually issued are void.

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We have a decision of the Court of Appeal based by two out of three Judges on the proposition that such an allotment is void, Lord Sterndale, M.R., assuming “that the allotment was void, and that it conferred no right upon the company to enforce obligations, in any, which would otherwise exist upon transferees of the shares or debentures, or impose any liability, except perhaps by estoppel, upon the company in respect of them” ([1923] 1 Ch. at p. 15)—and this view seems to have recommended itself to Lord Finlay ([1924] A.C. at p. 966).

I find no suggestion by any Judge indicating that stock issued under these circumstances is anything but void except so far as the company is estopped from setting it up—and nowhere is there any suggestion that, contrary to Lord Sterndale’s assumption, a company by a forbidden allotment can confer on itself the right “to enforce obligations . . . which would not otherwise exist. . . .”

I have gone through our own cases and find no support for the proposition that an allotment without prospectus can give the company any rights. It will suffice to refer to *Premier Trust Co. v. Raymond* (1922), 52 O.L.R. 533—the reversal of which, in (1923) 55 O.L.R. 30, was due to the discovery of the fact that a prospectus had been filed—there my learned brother Middleton held void a mortgage given to secure debentures issued without prospectus or statement in lieu of prospectus.

Whether this will be considered the law when reviewed in the light of the *Jubilee* case we need not decide—it certainly affords no aid to the company here.

Mr. Justice Wright’s decision in *Martin v. Clarkson* (1925), 57 O.L.R. 499, is on the wording of the Ontario Act; and in any case it may well proceed on the ground of estoppel.

Nor are we satisfied by the *factum valet* cases—to apply the maxim there must be *factum quid, un fait accompli*, something completed, something *in esse*, nothing *in fieri*. For example in *Regina v. Lord Newborough* (1869), L.R. 4 Q.B. 585, where payment had been made to constables not in accordance with the statute, Lush, J., decided that, as the order for payment had been acted on, the account allowed and the money paid, the matter should not be re-opened—*factum valet*. Moreover, in that case



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there was no prohibition in the statute 1 & 2 Wm. IV. ch. 41, sec. 1, but only a direction.

Blackburn, J., in *Windsor v. The Queen* (1866), 6 B. & S. 143, at p. 183, does no more than refer to the maxim; and in *Auchterarder Presbytery v. Earl of Kinnoull* (1839), 6 Cl. & F. 646, at p. 708, the omission was immaterial, and the Minister actually inducted.

The principle upon which the present case is to be decided is the old and well established rule that no one can have the assistance of the Court in an attempt to place himself in better legal position by breaking the law — *Ex turpi causâ non oritur actio*, whether the turpitude is moral or legal, a breach of the moral law or of the law of the land. As is said by Lindley, L.J., in *Scott v. Brown Doering McNab & Co.*, [1892] 2 Q.B. 724, at p. 728:—

“This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v. Johnson* (1775), Cowp. 341, 343.”

No right of action can spring out of an illegal contract. See *per* Lord Abinger in *Lewis v. Davison* (1839), 4 M. & W. 654, at p. 657—the *locus classicus* is Lord Mansfield’s judgment in *Holman v. Johnson*, 1 Cowp. 341, at p. 343: “No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

Equity is equally pronounced. Lord Eldon, in *Evans v. Richardson* (1817), 3 Mer. 469, himself took the objection (p. 471) that “the contract subsisting between the parties was a contract to defeat the laws of the country.” *Whiteman v. Sadler*.

[1910] A.C. 514, is equally emphatic. The Irish case *Gramophone Co. Ltd. v. King*, [1914] 2 I.R. 535, *per* Gibson, J., at p. 539, is also in point.

The very highest the company can put its case is that there was a contract on the part of the respondents to take and pay for shares to issue which would involve "the transgression of a positive law of this country," to use the language of Lord Mansfield, "to defeat the laws of the country," to use that of Lord Eldon.

In this view it makes no difference whether we dub a statute prohibitive or directory—although in the present case it savours of the absurd to style a statute directory and not prohibitive which does not direct and does nothing but categorically prohibit.

There is no contention that the filing of the statement in lieu of prospectus and formal allotment in 1921 could have any effect if the previous informal allotment was wholly invalid.

The above is sufficient to dispose of the appeals adversely, and I do not enter upon an investigation of the other formidable difficulties in the way of the appellant.

I would dismiss the appeals with costs.

LATCHFORD, C.J., agreed with RIDDELL, J.A.

MASTEN, J.A.:—The leading facts are fully detailed in the judgment of my brother Riddell, and need not be here repeated, but a chronological list of the more important occurrences may be convenient.

The syndicate referred to in the agreements and proceedings was formed in the summer of 1919.

Contract between the syndicate and the Blue Bird Manufacturing Company (American), 25th November, 1919.

Contract between the syndicate and the Blue Bird Appliance Company (American), December, 1919.

Subscribers' agreement signed by the respondents (exhibit 1), 5th January, 1920.

Letters patent issued incorporating the company, 3rd February, 1920.

Organisation meeting of the company, 6th February, 1920.

Action by the company against McEwen and Lipovitch begun, 29th June, 1921.

Statement in lieu of prospectus filed with the Secretary of State, 5th October, 1921.

Formal by-law of allotment, 12th October, 1921.

Notice of allotment to the respondents, 14th October, 1921.

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Assignment in bankruptcy, 6th September, 1923.

It is admitted by counsel for the appellant that in order to succeed in these appeals he must establish that the respondents were, at the date of the authorised assignment, shareholders of the company or bound by contract to accept and pay for shares.

None of the respondents, except Gott, are registered as shareholders of the company, and no certificate of shares has ever been issued to any of the respondents, except Gott. None of the respondents, except Gott, assumed to act as shareholders. Gott attended one meeting, but he was, at the time, the holder of paid-up shares to the value of \$2,000.

The first question to be considered is, did the respondents apply for allotment to them respectively of shares in the company? Such application, if it exists, must arise out of the subscription agreement, exhibit 1, of the 5th January, 1921. That document is very fully recited in the judgment of my brother Riddell, but for convenience I repeat here the clause upon which turns, in my opinion, the question whether it is an application or not:—

“We, the undersigned, do hereby severally covenant and agree each with the other and with the syndicate herein named to become shareholders in a company to be incorporated under the provisions of the first part of the Companies Act (chapter 79 of the Revised Statutes of Canada 1906), under the name of ‘Bluebird Corporation Limited’ or such other name as the Secretary of State may give to the company, with an authorised capital of \$1,000,000, divided into 10,000 shares of \$100 each; and we do hereby severally, and not one for the other, subscribe for and agree each with the other and with the members of said syndicate to take the respective amounts of the capital stock of said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.”

Such is the only document which the respondents signed, and no oral application to the company for shares is established by the evidence. I am of opinion that we are bound by authority to hold that the subscription quoted above is not an application for shares. The question arose in the Court of Appeal in *In re London Speaker Printing Co., Pearce's Case*, 16 A.R. 508, 512. In that case Pearce signed an instrument purporting to be a subscription for shares in a company “proposed to be incorporated” under the Ontario Joint Stock Companies Letters Patent Act, in which he agreed with the company and the signatories thereto to take the number of shares set opposite to his name. Pearce was not an incorporator named in the letters patent, and no shares were in

fact ever allotted to him, but he was entered in the books as a shareholder, and notices of meetings and demands for payment on calls were sent to him, and in winding-up proceedings he was placed on the list of contributories. The case was heard before the Court of Appeal, consisting of Burton, Osler, and Maclellan, JJ.A. On p. 514, Osler, J.A., says:—

“If any liability is cast upon a person who, prior to the issue of the letters patent, has signed an agreement to subscribe for shares in a projected company, but who is not one of the corporators mentioned in the letters patent, and has subsequently refused to subscribe or apply for or accept shares, it must be a statutory and not a contractual or common law liability, as there can be no privity of contract between him and a company which was not in existence when he became a subscriber. It is hardly necessary to cite authority for this.”

At the bottom of p. 514, he says:—

“There was no application by him (Pearce) to the company for shares, and therefore no authority to them to allot shares or to enter his name as a shareholder, unless they derived it from his subscription to the agreement made before the issue of the letters patent.”

Again, on pp. 515 and 516, he says:—

“Our Act contains no definition of the term subscriber, but, looking at sec. 44, which enacts that the directors may call in and demand from the shareholders all sums of money by them subscribed, when and where and in such payments as the letters patent or the Act or the by-laws of the company prescribe or allow, I think a subscriber may, for the purposes of the Act, be described as a person who has put down his name to a contract by which he binds himself to contribute to the extent of the number of shares for which he puts down his name.

“This, however, carries the case no further, for the expression, ‘a subscriber to stock in the company,’ must mean by a contract with the company, unless the Act has given it a wider meaning, and this, in my opinion, it has not done.”

At pp. 517 and 518, he says:—

“I have said that the alleged agreement cannot, by itself and without more, constitute an application, for I have no doubt that an application for shares may be prepared and signed previous to the formation of the company, and entrusted to a promoter or broker or other person interested in the company, to be made use of or acted upon afterwards. Or a person desirous to become a shareholder may authorise an agent beforehand to apply for shares on his behalf upon the incorporation of the company. . . . All

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I mean to say is, that we cannot infer such authority to any one from the instrument in question, and cannot treat it as an application to a company which had not even an inchoate existence.

"It is clear that the appellant is not a shareholder and that the order to settle him on the list of contributories should be discharged."

I ought perhaps to add that the agreement signed by Pearce in that case was as follows:—

"We, whose hands and seals are hereunto set, do hereby severally subscribe for the number of shares of \$20 each, set opposite to our respective signatures hereto in the capital stock of the company, whereof the prospectus is hereto prefixed, proposed to be incorporated under the name of 'Speaker Printing Company,' or such other name as the Lieutenant-Governor shall approve, by letters patent under the Ontario Joint Stock Companies Letters Patent Act, with an authorised capital of \$90,000, to be divided into 4,500 shares of \$20 each.

"And we do hereby severally and respectively agree with the said company, and agree with each other, and with each and any one or more of the others of us, to subscribe for and take the said respective numbers of said shares, and to pay on each of such shares twenty-five per cent. thereof on subscription hereof, or whenever required by the directors or provisional directors of the company; a further twenty-five per cent. within one month after the incorporation of the company, and the residue thereof in such sum or sums as shall be and whenever by the directors required."

This judgment was pronounced in the case of a company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1887, ch. 157, but, in so far as it relates to the construction of the subscription agreement signed by the present appellants, the views pronounced by Mr. Justice Osler are applicable to a company incorporated in 1920 under the Dominion Companies Act.

No doubt, there is great force in the argument that the subscription agreement under consideration in this case is a continuing application for shares entrusted to the syndicate for delivery to the company after its incorporation. I have read with interest the cases *In re Olympic Fire and General Reinsurance Co. Ltd.*, [1920] 1 Ch. 582, [1920] 2 Ch. 341, and *Premier Briquette Co. Ltd. v. Gray*, [1922] Sess. Cas. 329, cited by Mr. Tilley in his reply, and, if I may respectfully say so, the conclusions in these two cases command my fullest assent. They are both cases where, contemporaneously with or after the incorporation of the company, a sub-underwriter of shares executed and sent to the

underwriter a sub-underwriting agreement and other documents which, having regard to the fundamental characteristic of a sub-underwriting transaction, could only be intended to be used as they were used, viz., as applications for allotments of shares and as authority to the chief underwriter to act as the sub-underwriter's agent in presenting or making application to the company accordingly.

The subscription agreement (exhibit 1) is an executory agreement of several subscribers *inter se* to be incorporated for the purpose specified and to take and pay for certain shares in the proposed company. It would become executed by an application on the part of the subscriber to the company after its incorporation for allotment of shares to him. It does not expressly or impliedly authorise the syndicate or any one else to act as the agent or attorney of the subscriber in applying in the name of the subscriber to the company for the shares subscribed for. In my view, the syndicate had no right so to apply or to assume to assign such subscriptions to the company, for every other subscriber to the agreement had an interest in the respondent's covenant, which was made with each of them as much as it was made with the syndicate. How then could the syndicate by itself assign it?

Even if we were not bound by statute to follow the decision of the Court of Appeal in *Pearce's Case*, I for one would not think of refusing to follow it in the present case, not only for the reasons already indicated, but because it was a considered decision pronounced by most eminent authority, nearly 40 years ago; adopted by subsequent judicial decision (see *In re Nipissing Planing Mills Ltd.*, 18 O.L.R. 80), and acted upon by company counsel and conveyancers since 1899. Since the decision, the sections which then corresponded to secs. 5 and 13 of the present Act have been amended, but no alteration has been made which varies or modifies the decision in *Pearce's Case*, and hence by implication the interpretation of a common form as expressed in that case has been adopted by Parliament.

I conclude that both on authority and on principle there never was an application by the respondents for the shares in question. The appellant's case therefore fails, in so far as it is sought to found it on the usual basis of an application for shares—allotment and notice—for there never was an application by the respondents, either directly or through an authorised agent, which the company could accept.

Demands by the company after its incorporation for payment by the respondents as alleged shareholders cannot give life to an application that never existed.

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A second ground put forward by the appellants for making the respondents contributories in the winding-up is that sec. 13 of the Companies Act makes the respondents shareholders without any application or allotment, because they were signatories to the subscription agreement of the 15th January, 1921 (exhibit 1). But that agreement was not filed at Ottawa as part of the application for incorporation, and what was filed was neither a duplicate of exhibit 1 nor even a copy of it. The agreement mentioned in secs. 5 and 13 of the Dominion Companies Act is, in my opinion, the agreement filed on the application for incorporation, and does not embrace a different document (such as exhibit 1) not filed with the Department of the Secretary of State. Pre-incorporation subscription documents which were not filed as part of the application for incorporation have been considered by various courts throughout the Empire, and the opinions expressed lend support in every instance to the conclusion reached by this Court in the present case. I refer to *Guzerat Spinning and Weaving Co. v. Girdharlal Dalpatram* (1880), 5 Ind. L.R. (Bombay) 425, and *Imperial Flour Mills Co. Ltd. v. Lamb* (1888), 12 Ind. L.R. (Bombay) 647. Other cases to a similar effect will be found noted in vol. 9 of the English and Empire Digest, at pp. 186 *et seq.* and 232.

On this point I agree fully with the very complete analysis which my brother Riddell has made of the provisions of the Dominion Companies Act and concur with his reasoning and result.

If I am right in the conclusion that there was no application to the company by the respondents for shares and no subscription to the memorandum of agreement mentioned in sec. 13, it becomes unnecessary to discuss the other questions raised on the appeal, including allotment and notice of allotment.

I have no hesitation, however, in expressing my concurrence in the finding of fact by the trial Judge that Gott compromised the claim against him at \$2,000, that he thereby became the holder of 20 shares fully paid, and that any further claim against him was cancelled.

I am also of opinion that the effect of our statute is to render void, and not merely voidable, any allotment of shares attempted to be made prior to the filing of a prospectus or a statement in lieu thereof. The unfortunate results which may in some cases flow from that conclusion (see *In re Guardian Permanent Benefit Building Society* (1882), 23 Ch. D. 440, and *Sinclair v. Brougham*, [1914] A.C. 398) are matters which, in my opinion fall to be dealt with by Parliament and not by the Courts.

For these reasons I would dismiss the appeals with costs.

I add only one word further. In the case of *In re Olympic Fire and General Reinsurance Co. Ltd.*, [1920] 2 Ch. at p. 345, Lord Sterndale, M.R., says:—

“On the evidence before us there was not only a clear breach of contract with the Trust, but it seems to me there was a very considerable and grave breach of faith. I do not wish to say anything about that for this reason. Very often in these cases there are matters behind which do not really legally bear upon the question before the Court but which may and often do influence the motives of the parties in their action, and therefore I do not wish to say anything about that. The question we have to decide is simply a question of law.”

I think that remark applies to the circumstances of this case as between the respondents (other than Gott) and their co-adventurers, the other subscribers to exhibit 1. But the question before us is purely a question of law in regard to which such considerations are irrelevant.

MIDDLETON, J.A.:—I agree with my brother Masten that the liquidator cannot succeed unless a contract is shewn, and that no contract has been made out. I do not think it necessary or desirable to discuss other questions argued.

*Appeals dismissed with costs.*

[MIDDLETON, J.A.]

RE HOLLWEY AND ADAMS.

1926.

March 10.

*Will—Devise of Land—Registration of Will—Proof of Title under—Will not Admitted to Probate—Vendor and Purchaser—Evidence Act, sec. 42—Trustee Act, sec. 50—Registry Act, secs. 2(d), 56, 71, 72, 77—Devolution of Estates Act.*

It is not necessary in order to establish the title of a devisee of land that the will containing the devise shall be admitted to probate by a Surrogate Court. Section 42 of the Evidence Act, R.S.O. 1914, ch. 76, is permissive only.

A purchaser taking under a registered will which has not been proved in a Surrogate Court is protected by the Registry Act, R.S.O. 1914, ch. 124: see secs. 2(d), 56, 71, 72, 77.

The conclusive effect of an erroneous grant made by a Surrogate Court through fraud or inadvertence (sec. 50 of the Trustee Act, R.S.O. 1914, ch. 121), is limited to the action of the executor, and does not operate so as to afford any protection to those claiming under the devisee.

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A purchaser's objection to the title of his vendor, claiming under a will registered but not proved in a Surrogate Court, and a deed from the devisees, made long after the land had vested in them by virtue of the Devolution of Estates Act, was *held*, upon an application under the Vendors and Purchasers Act, to be invalid.

APPLICATION by a vendor of land, under the Vendors and Purchasers Act, for an order declaring invalid an objection to the title taken by the purchaser.

March 5. The application was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

*D. R. Leask*, for the vendor.

*H. D. Anger*, for the purchaser.

March 10. MIDDLETON, J.A.:—Annie E. Judd at the time of her decease on the 18th May, 1916, was the owner of the land in question. By her will, bearing date the 16th February, 1916, she appointed two of her sons executors, and devised her property to them. The vendor claims title under a deed from these two sons to her in 1925, long after the expiry of three years from the date of the death of the testatrix, so that the lands had vested in the sons by virtue of the provisions of the Devolution of Estates Act.

The objection taken to the title is that the will of Mrs. Judd was not admitted to probate. The solicitor for the purchaser voices his protest thus: "We do not see how it is possible to waive demand to have this will proved, for the reason that no will can be taken as the last will until it has been certified as such by the Surrogate Court after propounding it as the last will. It is the possibility of a new will being discovered in the future that makes it expedient for us to require, as we now do, that this will be proved."

This objection is, in my opinion, unfounded, and based upon a fundamental misunderstanding of the law. Until the passing of the statute of 1858, about to be mentioned, and of a somewhat similar statute in England in 1857, the probate of a will was not admissible as evidence of the will where real estate was concerned. The Ecclesiastical Courts which granted probate had jurisdiction only with reference to personal property, and probate was necessary as the only admissible method of proving a will, in so far as it related to personalty, in civil courts. The title of the executor did not depend upon the probate but upon the will, and the title of those to whom personal property was bequeathed also depended upon the will and the will alone. The Ecclesiastical Courts alone

could entertain an inquiry as to whether a testamentary document was in truth a will, or the last will, of the testator, and the pronouncement of the Ecclesiastical Courts was the sole admissible evidence when the executors resorted to the courts to assert their rights, although an action might be maintained against executors without probate, the plaintiff then making his *primâ facie* case by shewing an intermeddling with the assets of the deceased person: *Mohamidu Mohideen Hadjar v. Pitchey*, [1894] A.C. 437.

*Doe dem. Ash v. Culvert* (1810), 2 Camp. 387, will shew how jealous the Common Law Courts were of the Ecclesiastical Courts where land was concerned. A will had been lost by the officers of the Probate Court, and it was sought to prove the will by the probate, which, of course, quoted the will *in extenso*. Lord Ellenborough ruled that this was inadmissible, saying (p. 389): "I cannot attach any authority to the probate as far as the will relates to real estate. A will of lands does not require to be proved at all, and the Ecclesiastical Court has no control over it. Therefore, to shew that this is a true copy, we have only the seal of a court without jurisdiction upon the subject."

By the Surrogate Courts Act of 1858, when the Courts of Probate in this Province were abolished and Surrogate Courts established, a provision similar to the English Act of 1857 was enacted (22 Vict. ch. 93, sec. 33, U.C.) Modified in form, this section is now found as sec. 42 of the Evidence Act, R.S.O. 1914, ch. 76. It enacts, "In order to establish a devise or other testamentary disposition of or affecting real estate, probate of the will . . . containing such devise or disposition . . . shall be *primâ facie* evidence of the will, and of its validity and contents." This, it will be observed, only makes probate an admissible method of proving the will and does not make it obligatory. The original section from which this is derived is confined to the proof of a will in an action at law or a suit in equity, where it would have been necessary to produce an original will to establish a devise affecting real estate. By this it is made lawful to establish and prove the devise by the production of the probate, provided ten days' notice of the intention to prove the will has been given to the opposite party. This emphasises the permissive nature of the section in question.

The conclusive effect of an erroneous grant made by a Surrogate Court through fraud or inadvertence, provided by sec. 50 of the Trustee Act, R.S.O. 1914, ch. 121, is limited to the action of the executor and does not operate so as to afford any protection to those claiming under the devisee, so that the purchaser would not receive any adequate protection from its provisions.

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The fear of the purchaser, underlying this objection, that he will be in jeopardy by reason of taking under a registered will which has not been proved in the Surrogate Court is entirely without foundation, for the Registry Act affords to him the most adequate protection possible.

This statute, R.S.O. 1914, ch. 124, sec. 2(*d*), defines the word "instrument" so as to include a will. By sec. 56 two methods of registration of wills are provided: first, the production of the original will and the depositing of a true copy thereof with an affidavit certifying such copy, and with an affidavit sworn by one of the subscribing witnesses to the will proving the due execution thereof by the testator, and proof of the death of the testator. The other method is the alternative one of registration of the probate, with which we are not now concerned. By sec. 71, every instrument which is not duly registered is void as against any subsequent purchaser for valuable consideration without actual notice, and by sec. 72 priority of registration shall prevail where there is no actual notice of the prior instrument. The effect of this provision is that where a will is duly registered any purchaser claiming title through or under the will is perfectly protected, for if there is an unregistered will it is void as against him, and those taking under this will would be left to their remedy against the vendor of the land.

Section 77 affords protection to those entitled to claim under the will against any precipitate action either by the heir at law or those claiming under another will, for it provides a period of twelve months during which the will, upon being registered, shall be as valid and effectual against subsequent purchasers as if the same had been registered immediately after the death. Here the will was not registered until many years after the testatrix's death, so the jeopardy of displacement, by virtue of this section, is non-existent.

For these reasons, I make an order declaring that the objection which has been taken to the vendor's title is not a valid objection thereto.

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## [APPELLATE DIVISION.]

## RE BLOOR STREET WIDENING.

1926.

March 10.

*Costs—Appeal from Order of Ontario Railway and Municipal Board—Jurisdiction of Appellate Court over Costs of Proceedings before Board.*

The Appellate Division of the Supreme Court of Ontario has jurisdiction, upon an appeal from a decision of the Ontario Railway and Municipal Board, over the costs of the proceedings before the Board (HODGINS and FERGUSON, JJ.A., dissenting).

Sections 26, 27, and 74 of the Judicature Act and secs. 23(2), 39-42, 45(3), and 48 of the Ontario Railway and Municipal Board Act, considered.

IN this case, *ante* 230, the appeal of certain ratepayers from an order of the Ontario Railway and Municipal Board was allowed (by a majority judgment) with costs "here and below."

The respondents, the Municipal Corporation of the City of Toronto, now moved to vary the decision as to costs by eliminating the part dealing with the costs before the Board, upon the ground that these costs were in the discretion of the Board, and the Supreme Court of Ontario had no jurisdiction over them.

January 14. The motion was heard by MAGEE, HODGINS, MIDDLETON, FERGUSON, and SMITH, JJ.A.

*W. G. Angus*, for the applicants.

*C. F. H. Carson*, for the respondents.

March 10. MIDDLETON, J.A.:—In the opinion of the majority of the Court, the city corporation, having attempted to obtain leave to repeal a by-law, and having failed in this attempt, should pay the costs, not only in this Court but before the Board.

A motion is now made before this Court to vary this decision by eliminating that part which deals with the costs before the Board, upon the theory that these costs are in the discretion of the Board, and this Court has no jurisdiction over them.

In several cases dealt with by this Court upon appeals from the Railway and Municipal Board, it has been assumed that it has jurisdiction over the costs before the Board, and judgments have been pronounced upon this theory.

The Judicature Act, sec. 27, in dealing with the powers of a Divisional Court upon any appeal, provides that the Court may give any judgment which, in its opinion, ought to have been pronounced by the court below.



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It is true that the Railway and Municipal Board, by sec. 50 of its constituting Act, the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, is given full power over costs of proceedings had and taken before the Board, but this does not place it in any different position from that occupied by a Judge or judicial officer, for the costs of proceedings before him are, by sec. 74 of the Judicature Act, expressly declared to be in his discretion. The ordinary Judge, exercising his normal jurisdiction, unquestionably has full power over the costs of proceedings before him, but if he errs, or if he is thought by an appellate court to have erred, the appellate tribunal, as part of its appellate jurisdiction, deals with the costs of the proceedings before him. It would be a very strange and anomalous thing if, after determining that the court below was in error, the appellate court should have to remit the question of costs to the erring court below instead of dealing with them itself.

Of course if the legislature has provided that this course is to be adopted, effect should be given to the legislative will, no matter how extraordinary it may appear to be.

It is said that this intention can be gathered from certain provisions in the Act relating to the Railway Board. That statute (sec. 48(3)) requires the appellate court to certify its opinion to the Board, which will then make the necessary order for carrying it into effect. Before the Judicature Act, the Court of Appeal certified its opinion to the Court below, which made an order carrying it into effect, but when the courts were consolidated this practice was superseded. The Supreme Court became one Court, and an order made by either the Appellate Division or the Trial Division can readily be given effect to. Judgments of the Supreme Court of Canada or of the Privy Council reversing judgments of this Court are certified to this Court and carried into effect through its due process, and such judgments deal with the costs in this Court. There cannot in this be found any indication that the power of the appellate court over costs in the court below is limited.

Then it is said that because express power is given to the appellate court to deal with costs of the proceedings in that Court (sec. 48(5)) it must be taken to be intended that the appellate court should not deal with costs in the court below. I cannot see that this follows.

Finally, it is said that because the appellate court can, under the statute (sec. 48(1)), deal only with questions of law and jurisdiction, and cannot entertain an appeal upon a question of fact, it cannot deal with the costs. Again, I cannot follow the reasoning. True,

we cannot reverse the Board because of error in fact, but when it is our duty to reverse on a question of law, why should not the ordinary result follow? If we have as a result of our opinion to remit the matter to the court below to be further dealt with, it may well be that in the exercise of our discretion we would expressly provide that the costs should be subject to the order and direction of the Board. This is the course not infrequently adopted in appeals from ordinary courts.

In this case we thought that the Board was wrong in law and had no jurisdiction to make the order appealed from. The matter was finally ended. Why should it be reopened before the Board to enable it to determine the proper incidence of costs, when it is done by the judgment we have pronounced? It could surely not have been intended that in such a case as this, where, in our view, the application should have been dismissed, the Board should be in a position to compel the successful litigant to pay the costs of the unsuccessful, or to introduce an element of comedy by disregarding the opinion expressed by the appellate court.

MAGEE, J.A.:—I agree with my brother Middleton. It is not as if a case were, by the Act, directed to be stated by the Board for the opinion of this Court on a question of law. A definite right of appeal is given to the parties. It is true that that right of appeal is limited to questions of jurisdiction and law, and the appellate court is to accept the Board's express findings of fact; but, so far as that affects the present question, it is in principle no more than the restriction which in fact exists against disturbing the finding of fact by a jury upon contradictory evidence.

The right of appeal is one thing, the form in which the decision on appeal is to be framed, whether certificate or order, is another. The same argument from its form might be used if the right of appeal were general and not limited. Where the question of law does not go to the root of the case before the Board, it might be improper for the appellate court to dispose of the whole matter; but where, as here, it does go to the root of the dispute and disposes of the whole, there is no reason why the whole should not be dealt with as is usual on appeal and the decision be carried out by the Board as directed in the statute and as is not unusual with other courts.

SMITH, J.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—The statute, R.S.O. 1914, ch. 186, giving an appeal to a Divisional Court, provides that the Ontario Railway

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and Municipal Board, though not a Court—*Re Toronto Railway Co. and City of Toronto* (1918), 44 O.L.R. 381—shall have all the powers of a court of record, and so it may, in its discretion, give or withhold costs on applications before it (sec. 50).

All that the Divisional Court can do is to certify its opinion to the Board on questions of jurisdiction or law (sec. 48(3)) after drawing "all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary for determining the question of jurisdiction or law."

The Board's powers are exclusive so far as the facts are concerned (sec. 45(3)), and the duties and powers of the appellate court are limited to giving its opinion on the basis of the facts ascertained by the Board, and then only on a question of law or jurisdiction. The Board has the right to decide questions of law as well as of fact; but, if it goes wrong in its determination of the law or in its application to the facts as found by it, this Court can correct that determination or application. But, when we render our opinion thereon, it is for the Board, and not for us, to apply it and to give an order making it effective in the case before it. This is specially set out in sec. 48(3), where what is to be done after an appeal is outlined. The reasonableness of such a procedure is evident when the powers and discretion of the Board are considered (secs. 39-42), and these may be exercised after an appeal as well as before (sec. 23(2)). The two things, fact and law, are quite separate. See *per* Lord Atkinson in *Great Western Railway Co. v. Bater*, [1922] 2 A.C. 1, at p. 12, and *per* Lord Carson, at p. 35. This Court has, in my judgment, only such power as to costs as flows from its right of interference, and that is as to "costs upon the appeal" (sec. 48(5)). The costs of proceedings before the Board, so far as they involve finding the facts and hearing those interested in those facts, are not matters which concern us. The Board's proceedings in ascertaining the facts were necessarily expensive, as numerous counsel for property-owners appeared before it, and the Board should have the responsibility of awarding or withholding costs.

Since writing the above I have had the advantage of reading my brother Middleton's judgment. It is not to be presumed that the Board would disregard the opinion of this Court when it came to give effect to it, pursuant to sec. 48(3), or act unreasonably in so doing. But, if it did, that would not affect the question as to the extent of our jurisdiction. The substantial argument put forward is that the appellate court, having, by sec. 27 of the Judicature Act, power to give the judgment which ought to have been

given by the lower court, it can deal with the costs of the proceedings before the Board as part thereof.

By sec. 26(2) a Divisional Court is given jurisdiction "as provided by" (certain named Acts and by) "any other Act of . . . this Legislature." It is under this section that an appeal from the Board is possible. To find what that jurisdiction is in this case one must go to the Ontario Railway and Municipal Board Act (R.S.O. 1914, ch. 186), which determines the rights of the Appellate Division in the matter. In it there is found no authority to give a judgment (to which sec. 27 might well apply) but only an opinion on a question of law or jurisdiction, which opinion is directed to be acted upon by the Board, who "shall make an order in accordance with such opinion" (sec. 48(3)). This seems, as I have already pointed out, to require our opinion on the legal question to be applied and made effective by an order of the Board which, by sec. 50, is vested with authority over costs of proceedings before it.

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RE BLOOR  
STREET  
WIDENING.Hodgins,  
J.A.

FERGUSON, J.A., agreed with HODGINS, J.A.

*Motion dismissed (HODGINS and FERGUSON, JJA., dissenting).*

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[GRANT, J.]

BURCHELL v. BURCHELL.

1926.

March 19.

*Foreign Judgment—Action on—Husband and Wife—Divorce—Declaration that Husband Entitled to Interest in Property in Ontario—Alimony Payable by Wife to Husband—Enforcement in Ontario—Substance of Right—Parts of Judgment Severable—Jurisdiction—Matrimonial Domicile.*

The plaintiff and defendant, husband and wife, domiciled in the State of Ohio, respectively presented to an Ohio court a petition and a cross-petition for divorce and other relief; the court by its decree dismissed the petition of the wife, granted the cross-petition of the husband for a divorce, found that certain real estate in Ontario, the title to which was of record in the wife, and as to which both the wife and the husband had petitioned, was acquired out of their joint earnings and savings and as a result of their joint efforts, declared that the husband was in equity entitled to a one-half interest in the property, ordered and adjudged that the husband "have and possess, as and for alimony, a one-half interest in . . . the property," and ordered the wife to convey a one-half interest to the husband, or pay to him a sum equal to the one-half interest, namely, \$3,000."



1926. In the present action, brought in the Supreme Court of Ontario by the husband to enforce the foreign judgment, it was *held*:—
- BURCHELL. (1) That the judgment of a foreign court comprising two parts, one of which may be enforced in our courts, but the other not, is deemed to be severable, and one part will be enforced, though the other be rejected.
- BURCHELL. *Raulin v. Fischer*, [1911] 2 K.B. 93, followed.
- (2) That it is the duty of this Court to decide for itself the substance of the right sought to be enforced, irrespective of the opinion which may have been expressed by the foreign court.
- Huntington v. Attrill*, [1893] A.C. 150, followed.
- (3) That the wife was bound by the decision of the Ohio court, and this Court should accept and enforce that part of the judgment of the Ohio court which determined that the husband was entitled in equity to a one-half interest in the property.
- Burns v. Davidson* (1892), 21 O.R. 547, *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, and *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, followed.
- (4) That, although the Ontario Court does not know or recognise any right to alimony in a husband against his wife, the part of the judgment awarding alimony was also enforceable in Ontario, the law of the parties' matrimonial domicile warranting the allowance of it.
- De Brimont v. Penniman* (1873), 10 Blatch. Cir. Ct. 436, and *In re Macartney*, [1921] 1 Ch. 522, distinguished.
- (5) That, as the foreign court had fixed the whole value of the husband's rights in the property at \$3,000, there should be judgment for him for that sum, declaring him entitled to a lien therefor, and, in case of non-payment, directing a sale of the property to realise the amount.

#### ACTION upon a foreign judgment.

January 21. The action was tried by GRANT, J., without a jury, at Hamilton.

*J. L. Counsell*, K.C., and *H. A. F. Boyde*, for the plaintiff.

*S. F. Washington*, K.C., for the defendant.

March 19. GRANT, J.:—The plaintiff and defendant were formerly husband and wife, having been married in Sandusky, Ohio, and having had their domicile for some years in Detroit, Michigan, and subsequently in Cleveland, Ohio. It was clear upon the evidence that the domicile of the parties continued in the city of Cleveland, county of Cuyahoga, State of Ohio, at least down to the time when the marriage tie was dissolved.

The parties were married in or about the year 1897, and cohabitation was continued until the year 1916, when the defendant came to Hamilton, where she had lived as a girl and still had a brother residing. She returned to Cleveland and to her husband for some time and in the meantime was having a house built in Hamilton upon a property which had been procured for her by her brother. During all the years prior to 1916 the plaintiff-

husband had been contributing to the support of his wife, with greater or less regularity and in larger or smaller amounts, according to the credit to be given to the testimony of the plaintiff or the testimony of the defendant, who vigorously contradicted each other upon this and many other questions arising in the course of the trial.

The plaintiff-husband came with the wife, the defendant, to Hamilton in or about the month of March, 1917, and remained with her at the home in Hamilton for a couple of months. When navigation opened on the lakes, the plaintiff, who was a sailor, returned to his work, visiting the home in Hamilton once during that summer and returning there in December of that year, when the boats were laid up. This course was continued during the years which followed down to the year 1922 or 1923, according to the evidence of the defendant. The plaintiff-husband worked at whatever jobs he could find during the winter months and returned to his regular work on the boats in the summer season.

The defendant acknowledged quite frankly that she received money from him from time to time from his wages, and had similarly received money from him over the many years of their married life, and with blunt frankness stated in evidence that she considered that her husband was bound to support her, and therefore she used whatever money he sent or gave to her to provide her with food and clothing and to keep up the house, and that she saved and put in a bank-account in her own name whatever money she was able to make by keeping boarders or running a restaurant or in any other way that was open to her. Whatever the source from which the money came, it was established before me that the property in Hamilton, consisting of a lot and house erected thereon, had been procured by the defendant, the wife, and she had taken the property in her own name.

In 1924, the defendant, Martha Burchell, describing herself as a *bonâ fide* resident of the State of Ohio, at 819 St. Clair avenue, in the city of Cleveland, filed a petition as plaintiff in the Court of Insolvency in the county of Cuyahoga, State of Ohio. In the petition she alleged residence for more than a year last past in the State of Ohio and for more than thirty days last past in the county of Cuyahoga; that she and the then defendant (now plaintiff) were married in 1897; that no children had been born of the marriage; that the defendant had failed and refused to support her, although she had been at all times a dutiful wife; that she had been compelled to take in roomers and to run a restaurant, etc., to provide for her own support; that the husband had spent his money for liquors and misbehaved himself and

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Grant, J. associated with undesirable companions, both male and female,  
1926. and had been generally worthless and shiftless, absenting himself  
from home for long periods of time without any explanation or  
reason given for his absence. She further alleged that "as the result  
v. of her efforts she has accumulated a small sum of money and has  
BURCHELL. purchased for herself a house and lot at 27 Garfield street, in the  
city of Hamilton, Ontario, Canada."

Wherefore she, the then plaintiff, prayed that the marriage relation between the parties might be dissolved and that she might be released therefrom; "that the defendant (husband) may be perpetually enjoined from asserting any right, title, or interest in or to her property, whether personal or real or mixed; that upon final decree the defendant may be ordered to quit claim to her any interest that he may have in law or equity in said real property; that upon his failure to do so within five days this Court may make such conveyance on behalf and instead of the defendant; and for such other and further relief," etc.

By the above petition, proceedings were commenced by the wife, the then plaintiff (the defendant in this action), against her husband, seeking a divorce and seeking to obtain from the Ohio Court a decree in her favour ousting the then defendant-husband from any and all claim in respect of the Hamilton property.

In or about the month of December, 1924, as appears by his affidavit attached to his answer, the then defendant husband filed his answer in the Ohio Court, and subsequently—apparently on the 30th January, 1925—the then defendant filed his cross-petition, in which he alleged that he had been a *bonâ fide* resident of Ohio for more than one year last past and of the county of Cuyahoga for more than thirty days last past; that the then plaintiff and himself were married at Sandusky, Ohio, in 1897, and that no children had been born of the marriage; that the then defendant and cross-petitioner had at all times conducted himself as a true, faithful, and dutiful husband; that the plaintiff had been guilty of extreme cruelty and gross neglect of duty, in that several years previously she had taken up her residence in Hamilton, Ontario, and that, although the defendant, having steady work in Cleveland, Ohio, with little prospect of remunerative employment in Hamilton, had frequently requested the plaintiff to return to Cleveland and resume her home with him, and although the plaintiff had often promised to do so, she had failed and neglected so to do, and had recently, without just cause or excuse, notified him that she would not again live with him: that, as a result of their joint efforts, they acquired certain property, to wit, a house and lot known as 27 Garfield street, in the city of Hamilton,

Ontario, Canada; "that the defendant and cross-petitioner is informed and believes that this property is at this time valued at about \$15,000."

The then defendant and cross-petitioner went on to pray that the marriage relation heretofore existing between the parties may be dissolved and that he may be released therefrom; that the plaintiff may be perpetually enjoined from asserting any right, title, or interest in and to any of his property, whether real, personal, or mixed; that upon final decree the plaintiff be ordered to deliver and to convey to the defendant and cross-petitioner one-half of the above described property or a sum equal to one-half of the said property, \$3,000, and for such further and other relief, etc.

The issue between the parties in the Ohio court apparently was heard, and evidence of both the plaintiff and defendant therein was taken before the presiding Judge. Both parties were represented by their attorneys before the Ohio court, and there is no suggestion in those proceedings—nor was there any suggestion made before me—that either party took any exception to the jurisdiction of the Ohio court to deal with the matter then at issue between the parties; on the contrary, both parties to the litigation manifestly sought to obtain relief from the court in Ohio, thereby (for all necessary or useful purposes in the matter before me) asserting the right and jurisdiction of the Ohio court to deal with the matter.

On or about the 6th July, 1925, the presiding Judge of the Court of Insolvency of the County of Cuyahoga, State of Ohio, delivered judgment, of which an exemplification, duly certified under the seal of the Court, is filed in these proceedings as exhibit 1. The judgment recites that, the parties having been duly served and coming before the court, the case came on for hearing on the pleadings and the evidence, on consideration whereof the court found that the parties were married as stated in the cross-petition, that the defendant (husband) had not been guilty of neglect or misconduct as charged in the petition, but had in all respects conducted himself as a good and faithful husband, and the petition was therefore dismissed.

The court further found that the plaintiff (wife) had been guilty of extreme cruelty and gross neglect of duty, and that by reason thereof the defendant (husband) was entitled to a divorce as prayed for, and the marriage contract between the parties was therefore dissolved.

As the remaining paragraphs of the judgment or decree are of material importance, and the language used therein may be essential to the intelligent consideration and decision of the issue

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Grant, J. between the parties in the case at bar, such paragraphs are given  
1926. verbatim:—

BURCHELL “And the Court further finds that the parties hereto are the  
v. owners of certain real estate, to wit, a house and lot, known as  
BURCHELL. No. 27 Garfield street, in the city of Hamilton, Ontario, Canada;  
that the said property was acquired out of their joint earnings  
and savings and as a result of their joint efforts; that title to the  
said property is of record in the said Martha Burchell, and that  
in equity the defendant, Fred Burchell, is entitled to a one-half  
( $\frac{1}{2}$ ) interest in and to the above described property.

“It is further ordered, adjudged, and decreed that the said  
defendant have and possess, as and for alimony, a one-half ( $\frac{1}{2}$ )  
interest in and to the above described property, and the said  
plaintiff is hereby ordered to convey a one-half ( $\frac{1}{2}$ ) interest in  
said premises to the defendant, his heirs and assigns forever, by  
a good and sufficient deed of conveyance, or pay to said defendant  
a sum equal to said one-half ( $\frac{1}{2}$ ) interest in said property in the  
amount of three thousand (\$3,000) dollars.”

The plaintiff-husband now brings action in this Court, reciting  
the divorce obtained and the judgment with respect to the Hamil-  
ton property and the order to the defendant wife to convey a  
one-half interest therein to this plaintiff, or in the alternative to  
pay him \$3,000; and in the present action the husband-plaintiff  
asks judgment for the sum of \$3,000 with interest and costs, or  
in the alternative for a declaration that he is entitled to an  
undivided one-half interest in the said lands, and that the defend-  
ant wife holds the same in trust for him, as to such one-half  
interest; and for an account, and an order directing the defendant  
to convey, or for a vesting order, and for such further and other  
relief as to the Court may seem just.

The wife, by her defence in this action, after denial of some  
of the allegations, pleads that the Ohio court had no jurisdiction  
to declare that the Hamilton property had been procured by their  
joint earnings and that the husband-plaintiff was entitled to a  
one-half interest therein; that the order of the Ohio court direct-  
ing this defendant to convey to her husband a one-half interest  
in the property, or in the alternative to pay him \$3,000, was as  
and for alimony, and that “this Court has no jurisdiction to  
entertain a claim for alimony by a husband against his wife, and  
that therefore the judgment of the Ohio Court of Insolvency is  
null and void and of no effect in the Province of Ontario.”

A further plea by the wife that there had been fraud in the  
obtaining of the judgment in the Ohio court was formally aban-

done, as appears by notice attached to the record and confirmed by counsel before me.

The defences, stated briefly, are: (1) lack of jurisdiction in the Ohio court, the property being in Ontario; and (2) that, because the Ontario Court does not know or recognise any right to alimony on the part of a husband, against his wife, therefore this Court has no jurisdiction to enforce in favour of the husband a judgment or order of a court in a foreign state, in which the parties were domiciled and of which they were citizens and subjects, such judgment or order being for alimony or in the nature of alimony. This latter plea does not, properly speaking, raise a question of the jurisdiction of the Ontario Court, but rather a question of the law obtaining in this Province, and governing the decision of the issue between the parties.

From the material upon the record before me, it is clear that the Ohio court had, at the time of the trial therein, jurisdiction to entertain actions such as the one in which judgment was given. The question raised now is whether or not it had any jurisdiction or right to adjudicate, even between subjects of the United States, resident and domiciled in Ohio, upon a matter which, directly or indirectly, involves the right to property (an immovable) situate in Ontario.

The law appears to be settled that the judgment of a foreign court comprising two or more parts, one of which, according to English law, may be enforced in our courts, but the other not, is deemed to be severable, and the one part will be acted upon and enforced, though the other be rejected. The decision to this effect, which has been followed or cited with approval in other cases, is *Raulin v. Fischer*, [1911] 2 K.B. 93, in which Hamilton, J., expresses his approval of a statement of the law contained in Piggott on Foreign Judgments, 3rd ed., part 1, p. 90. This decision of Hamilton, J., is cited, apparently with approval as being a correct statement of the law, in Westlake's Private International Law, 7th ed. (1925), at p. 398, and in Foote's Private International Law, 5th ed. (1925), at p. 596. See also *Wood v. Wood* (1916), 37 O.L.R. 428, at p. 431.

It has been determined by the Judicial Committee of the Privy Council that it is the duty of this Court to decide for itself the substance of the right sought to be enforced, irrespective of the opinion or view which may have been expressed by the foreign court: *Huntington v. Attrill*, [1893] A.C. 150 (Lord Watson at p. 155).

In the proceedings in the Ohio court, the then plaintiff, the wife, after asserting that, as a result of her efforts, she had accu-

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Grant, J. mulated money and purchased for herself the Hamilton property,  
1926. asked that court (*inter alia*) "that the defendant (the husband)  
BIRCHELL may be perpetually enjoined from asserting any right, title, or  
v. interest in or to her property, whether personal, or real, or mixed;  
BIRCHELL. that upon final decree the defendant may be ordered to quit claim  
to her any interest that he may have in law or equity *in said real  
property*; that upon his failure to do so within five days *this  
Court may make said conveyance on behalf and instead of the  
defendant*" (exhibit 2).

The then defendant (husband) in his cross-petition alleges that the Hamilton property had been acquired as a result of their joint efforts; and he asks (*inter alia*) "that upon final decree the plaintiff be ordered to deliver and to convey to the defendant and cross-petitioner *one-half of the above described property or a sum equal to one-half the value of said property \$3,000,*" etc. (exhibit 13). The wife asserts the property in Hamilton to be hers and asks a decree to that effect, with a quit claim deed from the husband; and he asserts his right to a one-half interest in the property as having been procured by their joint efforts, and asks a declaration to that effect, implemented by a conveyance, and in the alternative a judgment against her personally for \$3,000 as the equivalent of his share. It is pertinent and perhaps material to note here that the husband in his cross-petition did not ask for the half interest in the Hamilton property or its equivalent in money, in any sense as alimony, nor does he base his claim upon any alleged right to alimony. The Court declares (*vide supra*) that the property was acquired out of their joint earnings and savings and as a result of their joint efforts, and that in equity the husband is entitled to a one-half interest in the property. In so far as the claim made by the husband in the Ohio court is expressed in his pleading, there was no claim to alimony or in the nature of alimony, but a claim to an equitable right to share in property purchased with the fruit of their joint efforts. This claim has been allowed by the court, which, however, has gone further, and in addition has decreed that the husband is entitled to recover one-half of the property "*as and for alimony.*"

The "substance of the right sought to be enforced" by the husband in the Ohio court was clearly his claim in equity above referred to; that claim was declared to be well-founded; and, even though some other part or parts of the foreign court's decision may, for one reason or another, be unenforceable in Ontario, this decree or declaration, if in itself unexceptionable, may be recognised by the courts of this Province, and enforced in the manner and by the proceedings usually adopted in the enforce-



ment of foreign judgments. In such cases, granting that the foreign court had jurisdiction, the judgment cannot be questioned for error in fact or in law. See Westlake's *Private International Law*, 7th ed., pp. 409, 410:—

“328. In England it is now established, after much uncertainty, that the judgment of a foreign competent court is in general a conclusive proof of the claim decreed for by it. ‘Several pleas,’ said Lord Denman, delivering the judgment of himself, Williams, Coleridge, and Wightman, in *Henderson v. Henderson* (1844), 6 Q.B. 288, 298, ‘were pleaded to shew that the defendant had not had justice done him in the Court of Chancery at Newfoundland. This is never to be presumed; but the contrary principle holds, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, are repugnant to natural justice: and this has often been made the subject of inquiry in our courts. But it steers clear of an inquiry into the merits of the case upon the facts found: for whatever constituted a defence in that court ought to have been pleaded there.’ . . . Without however denying that such cases may possibly occur, or forgetting that the reservations of the court in *Henderson v. Henderson* may receive other applications where the foreign law embodied in the judgment is contrary to stringent notions of morality or public policy entertained in England, and still more where the question involves the law or jurisdiction of some state scarcely civilised enough to be admitted within the intercommunion of private international law, it remains that the judgment of the competent court of an ordinary European or American state cannot be questioned in England for error either in fact or in law.”

See also Foote's *Private International Law*, 5th ed., p. 616:—

“It has thus been seen that error in law, whether domestic, foreign or international, is not in itself a ground on which a judgment can be reviewed in a foreign court, unless such error involve an assumption of jurisdiction in violation of ordinary international principles, or the Court pronouncing the judgment has proceeded without due notice against a party who is neither bound nor has consented to accept any substitute for notice in fact which the Court may have deemed sufficient. So far as these requirements are based upon natural justice, the dicta that a foreign judgment contrary to natural justice cannot be recognised may be supported, but there seems no ground for extending them further. Error in law having thus been disposed of, error in fact, as a ground for impeaching a foreign judgment, must next be considered, and as to this it may be said shortly that a foreign judgment, both in

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respect of the issues of fact found and the grounds on which the finding were arrived at, is now admitted to be conclusive," citing *Godard v. Gray* (1870), L.R. 6 Q.B. 139, 149.

In the case at bar the defendant (wife) brought the proceedings in the Ohio court, and by asking that court's decision thereon expressly affirmed its jurisdiction, not only over the parties themselves, but also in respect of the very question involving the equities between them arising out of the purchase of the Hamilton property with (as the court decided) their joint funds. The court chosen by the present defendant to adjudicate upon the question decided it in the husband's (plaintiff's) favour; the decision on this point is not in any sense contrary to natural justice, but rather in accord with it, if one accepts (as he must in law) the facts as found by that court; and the decision does not, in this portion of it at least, attempt to deal with the title to an immovable in a state foreign to it. Upon the authorities, and with a due regard for the established principles of private international law, as I apprehend them, I am of opinion that this Court should accept and enforce that part of the judgment of the Ohio court which finds as a fact that "the said property (in Hamilton) was acquired out of their joint earnings and savings and as a result of their joint efforts;" and which determines as a matter of law that "in equity, the defendant, Fred Burchell" (now plaintiff), "is entitled to a one-half interest in and to the above described property."

This is, in substance, merely a determination and declaration of the equitable rights of the parties, by the court of their own country, resorted to by themselves, for the determination of those rights. The then defendant (husband) now comes to this Court, which alone can deal with the registered title to the property, and, as plaintiff, he presents a judgment of the foreign court determining the equities between the parties, who were in every sense subject to its jurisdiction, and asks this Court to implement that judgment by giving it effect with respect to the property. In my judgment, the plaintiff's claim in that regard should be allowed.

The conclusion which I have reached upon this point is not without some judicial opinion to support it: *Burns v. Davidson* (1892), 21 O.R. 547, a decision of the Chancery Divisional Court. See particularly the language of the late Chancellor Boyd, at pp. 549, 551, and 552, where referring to and citing other decisions, he states (p. 549):—

"*Penn v. Lord Baltimore* (1750), 1 Ves. Sr. 444, leads a class of cases in which a plaintiff in England, having an equitable demand against a resident defendant, may enforce it not only

personally, but if the circumstances of the contract or dealings between the parties justify it, may have a declaration of lien against the land of the defendant, though it be situate out of the jurisdiction of the Court.

"All these cases depend on a privity existing between the parties arising from contract or from some personal obligation moving directly from the one to the other."

And (p. 551): "Authorities were cited to shew that in cases of fraud the Court would entertain jurisdiction even in cases of foreign lands. Reliance was placed on the language of Marshall, C.J., in *Massie v. Watts* (1810), 6 Cranch 148, at p. 160, where it was broadly laid down that in cases of fraud, of trust, or of contract, the jurisdiction of the Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that Court may be affected by the decree. But one has to look at a previous page to perceive the limitation of this passage; at page 158, the Chief Justice shews that he is speaking of a case of fraud, where one becomes the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff. That is the proper limitation of the more general language used here; and also by Lord Hardwicke in a case, not cited, of *Angus v. Angus* (1736), West's Cases *temp.* Hardwicke 23, where it is said, 'This had been a good bill as to fraud and discovery if the lands had been in France, if the persons were resident here; for the jurisdiction of this court as to frauds, is upon the conscience of the party.'

"Where fraud exists in respect to specific property out of the jurisdiction, whereby in conscience it should be the property of the rightful claimant as against the fraudulent holder; these being within the jurisdiction, a Court of equity can decree according to the equities, and operate on the person of the defendant so that he shall convey the land to the one entitled. But where the manner of relief is, as here, not to order conveyances *inter partes*, but to subject land to the exigencies of execution, then no personal judgment can touch the real result to be accomplished."

And (p. 552): "Here is no case of contract or obligation *inter partes*; no fraud of a personal character in regard to specific property claimed; nothing in short by way of personal equity attaching to the defendants in respect of the land which this Court can lay hold of; but only a right sought, of having execution against alleged foreign assets of the debtor, held by another in fraud of creditors. . . . In *Harrison v. Harrison* (1873), L.R. 8 Ch. 342, 346, Lord Selborne, speaking with the concurrence of James and Mellish, L.J.J., said, 'In our judgment all questions

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Grant, J. as to the burdens and liabilities of real estate situate in a foreign  
1926. country, in the absence of any trust or personal contract (which  
might make a difference), depend simply upon the law of the  
country where the real estate exists.'

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"I think the demurrer should be allowed with costs."

*Swaizie v. Swaizie* (1899), 31 O.R. 324, is another case of a divorce granted by a foreign court, with ancillary relief. The position in that case was the opposite of the case at bar, as there the husband had been plaintiff in the foreign court, and was defendant in the proceedings in Ontario, wherein the wife sought to enforce the foreign judgment. The husband sought to defeat her claim by setting up the plea of want of jurisdiction in the foreign court in which he himself had instituted the proceedings, but he was not permitted to do so. See particularly the language of the late Chief Justice of Ontario at pp. 333, 334, which is peculiarly applicable in the case at bar, with the parties transposed.

*Ferris v. Edwards* (1919), 15 O.W.N. 361, and *Weyburn Townsite Co. Ltd. v. Honsburger* (1919), 45 O.L.R. 176, are both cases in which the First Divisional Court of the Appellate Division has granted specific performance of contracts with respect to lands situate in other Provinces.

That the defendant (wife) is bound by the decision of the foreign court in the present case, *vide Rousillon v. Rousillon* (1880), 14 Ch. D. 351, and *Schibbsby v. Westenholz* (1870), L.R. 6 Q.B. 155, in which the governing principles are clearly enunciated.

For the reasons given and upon the authorities cited, I am of opinion that this Court should recognise and enforce the declaratory portion of the judgment of the Ohio court, as a severable part thereof, even though it be determined that the remaining portion of the judgment is not enforceable under a strict interpretation of the governing principles of law applicable thereto.

The defence put forward in respect of the second part of the judgment is that because the Ontario Court does not know or recognise any right to alimony on the part of a husband against his wife, therefore this Court will not enforce the judgment of a foreign court whereby alimony is awarded to a husband.

The decision cited by counsel as authority for this proposition is to be found in *In re Macartney*, [1921] 1 Ch. 522 (a decision of Astbury, J.), adopting and applying a principle of law enunciated by Woodruff, J. (Circuit Judge of the Southern District of New

York), in the case of *De Brimont v. Penniman* (1873), 10 Blatch. Cir. Ct. 436.

The principle of these decisions is referred to in Dicey on Conflict of Laws, 3rd ed. (1922), pp. 542, 543, 544, and foot-notes; in Westlake, 7th ed. (1925), p. 411; and in Foote, 5th ed. (1925), pp. 595 and 596.

As the views on this point expressed by Woodruff, J., were adopted by Astbury, J., consideration may properly be given first to the *De Brimont* case. The head-note reads as follows:—

“G., a French citizen, married in France, the daughter of P., and of his wife C., citizens of the United States. Such wife of G. died, leaving a child of such marriage. Under the statute law of France, providing that a father-in-law and a mother-in-law must make an allowance to a son-in-law who is in need, so long as a child of the marriage is living, G. afterward obtained, in a Court of France, a judgment or decree against P. and C., then residing in France, in an action in which they were served with process and appeared, requiring P. and C. to pay him a certain sum per year, in monthly payments, in advance, one-third of it to be for his use, and two-thirds of it for the use of the child. G. brought an action of debt, on the judgment or decree, in this Court, against P. and C. to recover the amount of the decreed payment for two years and seven months: *Held*, that the suit could not be maintained.

“The laws of France upon which such decree was made, and such decree founded thereon, are local in their nature and operation. They are designed to regulate the domestic relations of those who reside there, and to protect the public against pauperism. They have no extra-territorial significance, but must be executed upon persons and property within their jurisdiction.

“Such orders of the French tribunals are in this respect like orders of filiation, and orders made, under local statutes, to guard against pauperism, and in the nature of local police regulations, and are not founded upon principles which, irrespective of local statutes, are of universal acceptance, like judgments for a sum certain, founded upon contracts or other recognised private rights.”

In his consideration of the question before him for decision, the learned Judge uses the following language, at pp. 440 and 441:—

“The broad question, whether a citizen of the United States, whose daughter marries in France, can be prosecuted here upon a decree of a French Court, requiring him and his wife to pay an annuity for the support of their son-in-law, is prior to the inquiry last above referred to. The subject pertains to the domestic relations of our own citizens, and the duties and obligations resulting

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Grant, J. therefrom; and the decree in question proceeds upon the declaration of an obligation not in conformity with our laws, not known to the common law, and upon the continuance of the obligation itself after the relationship out of which it is deemed to have arisen has ceased by the death of the person through whom the affinity was traced. . . .

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“Whatever obligation or duty lies at the foundation of the claim of this plaintiff is the creature of positive statute, framed for the people of France, to regulate their domestic concerns, protect the public, and guard against pauperism and its evils.”

And (pp. 441, 442): “Such regulations are local in their nature, and in their application, and so are the orders for their enforcement. They are a part of a local system, to provide for paupers, and to relieve the public from their maintenance when they have relatives within certain designated degrees, who are of ability to support them . . . It would seem, that the policy of that country, as viewed by its Courts, does not require that the son-in-law or other claimant shall himself do anything for his own support, but that he is to be supported in idleness. That is probably not a matter of importance to the present inquiry, except so far as it may tend to shew that the judgment or decree is hostile to the policy of this country, and in conflict with the only ground upon which orders arbitrarily imposing upon one the burthen of supporting another would be tolerated . . . It does not require, but rather forbids it, when such recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens. The Courts of this country will be slow to hold that, whenever an American citizen shall visit France, and reside there temporarily, with his family, his son or his daughter, by a rash or imprudent marriage, can cast upon the parents, mother as well as father, the perpetual burthen of an annuity, for the support of the wife or husband. So long as such residence continues, no doubt the parents must submit to the laws of France. The orders of her Courts may be enforced against them, as those laws may prescribe; but, in a matter of this kind, those laws must be executed there, and such decrees can have, and ought to have, no extra-territorial significance. They rest upon no principles of universal acceptance, like the obligation of contracts, or the protection of generally recognised, private, personal rights. No disposition to deal with foreign judgments, so as to promote the ends of justice, demands that such decrees should be arbitrarily enforced in our Courts.”

It will further be found that the learned Judge decided that

the judgment of the French Court was not final, and, therefore, was not enforceable upon that ground.

A perusal of the reasons advanced by Woodruff, J., makes it abundantly clear that the learned Judge was shocked at the suggestion that persons who were citizens of and resident and domiciled in the United States should be compelled, by the courts of the United States, under a local statute of France, intended for the government of those who were resident and domiciled in France, to provide for the support and maintenance of a French son-in-law. It is to be noted that the action was by a Frenchman resident and domiciled in France, under a French statute, against American citizens, temporarily resident in France, but having their domicile in the United States, and seeking to enforce against their property in the United States a judgment obtained in the French Courts. There was neither at common law, nor by the general law to be found in civilized countries, any recognised legal or moral obligation on their part towards him; they had not entered into any contractual or quasi-contractual relation with him which could, by any reasonable implication, involve them in any such obligation.

The French statute was held to be for the government and control of French citizens, residing in France, and intended to prevent or diminish pauperism in that country; to be local in its application and without any extra-territorial significance or effect; and the learned Judge refused to enforce its provisions against United States citizens, domiciled in the United States. The facts in the case at bar are essentially different. The parties were married in the State of Ohio; the matrimonial domicile was in that State for many years previously to and including the time when the action was begun in Ohio; the action was brought in the Ohio court by the party (the wife) who now contests the authority of that court's judgment in the action brought by herself. The objection raised is that the law of Ohio, the law of the matrimonial domicile, gives property-rights to the husband which are not given by the laws of Ontario to a husband whose matrimonial domicile is in this Province.

In *In re Macartney*, an illegitimate child sought to enforce, in the English Courts, against the English property of her deceased father, who had been an Englishman domiciled in England but resident in Malta when the child was begotten (but had died some months before the birth of the child), a judgment of the Maltese Court granting her perpetual maintenance out of her father's estate wherever situate.

Astbury, J., decided that a valid foreign judgment *in personam*

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Grant, J. cannot be enforced in England: (a) if it is contrary to public  
1926. policy (perpetual maintenance to an illegitimate child); (b) if  
BURCHELL the cause of action is unknown in England (e.g., the right to a  
v. posthumous affiliation order); and (c) if the judgment is not final  
BURCHELL. and conclusive as to the amount payable (e.g., if the amount can  
be varied according to the child's circumstances); and he held the  
judgment not enforceable in England, on all three grounds.

It is with ground (b) that I have to deal in the case at bar. It may be noted, in passing, that this was only one of three grounds upon which the judgment was held to be unenforceable in England, and that upon this ground the learned Judge contented himself with lengthy quotations from the reasons for the decision in *De Brimont v. Penniman*.

The other material features of the case, for the purpose of the present inquiry, are that the judgment was of the nature of an affiliation order; that enforcement was sought of a judgment based upon a statute-law peculiar to the colony of Malta; and that the deceased testator, against whose property in England recourse was sought, was an Englishman, domiciled in England.

After careful study and consideration of these decisions and of the views of text-writers upon the general questions involved, I have come to the conclusion that at least one outstanding and decisive distinction between them and the case at bar rests upon the domicile of the parties. That this may be a material, and probably a deciding factor, is recognised by Astbury, J., where, in referring to the "possible exception" mentioned by Prof. Dicey, the learned Judge, about the middle of p. 527 of [1921] 1 Ch., uses these words, "*Where however the defendant is not domiciled in the local jurisdiction,*" and he proceeds to quote Prof. Dicey.

Moreover, it is pertinent to note that the Courts of England recognise and acknowledge the validity of a divorce granted by the court of a foreign State in which the parties were domiciled, even though the judgment of such foreign court be based upon grounds which are not recognised in England as justifying divorce: Dicey, 3rd ed., pp. 416, 418, 419; Westlake, 7th ed., p. 97, and case cited; Foote, 5th ed., p. 145.

Furthermore, "the law of the matrimonial domicile regulates the rights of the husband and wife to immovable property, whether in England or abroad, belonging to either of them, at least where that law by its rules of private international law holds the matrimonial system of property to be indivisible:" Westlake, 7th ed., p. 72, para. 35, and at the foot of p. 73, and further on, pp. 74 and 75, where cases are referred to at some length.

It seems to me that it is no more repugnant to English law that a husband should be entitled to recover alimony against his wife where the law of the matrimonial domicile awards it, than that her property should be held to be their property in common, for the same reason. In my opinion, therefore, the plaintiff would be entitled to obtain enforcement also of the portion of the foreign judgment which purports to grant him redress by way of alimony.

However that may be, as already stated, and for the reasons given, I am of opinion that he is, in any event, entitled to have enforcement of that part of the foreign judgment which purports to declare his equitable rights against the defendant. As the foreign court fixed the value of the plaintiff's interest or rights at the sum of \$3,000, with which amount the plaintiff appeared to be satisfied, there will be judgment for the plaintiff for the sum of \$3,000, declaring him entitled to a lien or charge upon the Hamilton property for that amount, and providing, in case of non-payment, for a reference to the Local Master at Hamilton for a sale of the property under the direction of the Court, to enable the amount so payable to be realised. The costs of the action and of the reference (if by reason of non-payment as aforesaid one be found necessary) will be to the plaintiff.

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[WRIGHT, J.]

MAYER & LAGE INC. v. ATLANTIC SUGAR REFINERIES LTD.

1926.

March 22.

*Contract—Sale of Goods for Export—Inability of Seller to Get Permit to Export—Frustration—Release of Seller from Obligation—Construction of Contract—Reservation by Seller of Right to Store or Resell Goods.*

In a contract for the sale by the defendant to the plaintiff of 5,000 tons of sugar, to be shipped by steamer from St. John, New Brunswick, to the plaintiff in New York, during the second half of September, 1919, it was provided that "if through inability to obtain letters of assurance or other permit necessary shipment cannot be made within contract time, seller reserves the right to either store or resell sugar for account and cost of buyer." At the date of the contract and for some months thereafter it was necessary that a permit or license to export should be obtained from the Canadian Trade Commission before any sugar could be exported from Canada. The defendant obtained a license to export 2,000 tons, and shipped that quantity to the plaintiff's order. During September, October, and November, 1919, the defendant used its best endeavours to obtain a license to export the remaining 3,000 tons, but failed. It sold all its sugar in the local market, declining to hold it over until 1920, when there was some prospect of a license being obtained:—

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*Held*, the contract being for export only, that its object was frustrated, and the defendant company was released from any liability to supply the remaining 3,000 tons.

It would be unreasonable to hold that the defendant was bound to retain the sugar in the hope that at some future time the restrictions as to export might be removed or a license to export might be obtained.

*In re Anglo-Russian Merchant Traders and John Batt & Co. (London) Ltd.*, [1917] 2 K.B. 679, followed.

The reservation by the seller of the right to store or resell the sugar for account and cost of buyer was a provision in favour of the seller and only to be exercised at its option—the purchaser could not insist upon either course being taken.

AN action for damages for breach of a contract.

The action was tried by WRIGHT, J., without a jury, at a Toronto sittings.

W. N. Tilley, K.C., A. C. McMaster, K.C., and J. M. Bullen, for the plaintiff company.

R. S. Robertson, K.C., and A. W. Langmuir, for the defendant company.

March 22. WRIGHT, J.:—This action, which was commenced in January, 1920, is brought by the plaintiff to recover damages from the defendant for breach of contract for the sale by the defendant of 5,000 tons of fine granulated sugar. In the pleadings the plaintiff claimed delivery of the sugar in question; but, as that was impossible, the action resolved itself into one for damages for breach of contract.

The plaintiff is described as a firm of merchant exporters, and carries on business all over the world. The defendant is a company carrying on the business of sugar refiners and has its refinery at St. John, New Brunswick, and warehouses in different parts of Canada.

The contract is evidenced by means of a sold note executed by Minford Luder & Co., sugar brokers in New York, who in this contract acted on behalf of the defendant. The material parts of the contract, which is dated the 25th June, 1919, are as follows:—

“Sold to Mayer & Lage Inc., 120 Broadway, N.Y.C., for account of Atlantic Sugar Refineries Ltd., Montreal, 5,000 tons fine granulated sugar at \$9.00 per one hundred pounds F.A.S. St. John, New Brunswick.

“Delivery to steamer during second half September, 1919. Sugars packed in bags and to be double bags weighing 100 lbs. in each.

“Tons to be of 2,240 lbs. net each.

"Payment net cash payable in New York in U. S. currency on presentation of shipping documents.

"Confirmed irrevocable credit to be opened not later than the 1st September, 1919.

"Seller's obligation as to delivery is complete upon presentation of shipping documents.

"Drawback payable to seller.

"Contracts and agreements contingent on strikes, accidents, fire, and other delays beyond seller's control.

"Where letters of assurance or similar documents are required before shipment can be made, if through inability to obtain letters of assurance or other permit necessary shipment cannot be made within contract time, seller reserves the right to either store or resell sugar for account and cost of buyer.

"Seller's liability is limited in accordance with such war clause as is embodied in seller's contract with the steamship company.

"Sugar to be shipped in vessel or vessels during second half of September, 1919, to be provided by buyer.

"Buyer to give seller 10 days' notice of expected arrival of steamer to take the goods.

"In the event of buyer failing to provide tonnage as above it is to reimburse seller for the actual cost and proved loss of holding over the sugar, including interest at 6 per cent. per annum. The provision of tonnage not to be unduly delayed."

At the date of the contract and for some months thereafter it was necessary that a permit or license to export should be obtained from the Canadian Trade Commission before any sugar was allowed to be exported from Canada. The defendant company obtained a license to export 2,000 tons of this sugar, and the same was duly exported or shipped to the plaintiff's order. This left 3,000 tons to be delivered, and it is in respect of this quantity that the action is brought.

During the months of September, October, and November, 1919, the defendant used its best endeavours to obtain a license to export the 3,000 tons in question, but it was unable to obtain the same. An endeavour was made to have the plaintiff company agree to a cancellation of the contract, but this the latter refused to do.

The defendant company sold all its sugar in the local market and declined to hold the same over until the year 1920, when there was some prospect of a license or permit being obtained.

The defences as pleaded and as sought to be established are as follows:—

(1) That the contract was subject to and conditional upon a

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permit or license to export being obtained, and that, as that failed, the contract was frustrated.

(2) That the plaintiff failed to maintain an irrevocable credit, as stipulated for in the contract, there being a period from the 10th November to the 25th November, 1919, when such credit was not maintained, and notice given to the defendant, and the latter was thereby released from its contract.

It was manifestly the intention of both parties to the contract that the sugar was to be purchased for export only, and in that connection it is well to note that it was a material consideration for the defendant that upon all sugar exported a drawback was paid or allowed by the Government of Canada to the extent of about \$1.45 per hundred weight, and this by the terms of the contract was payable to the defendant.

At the trial there was some discussion as to whether it was the duty of the seller or the buyer to obtain a license to export, and there was some suggestion that the seller (the defendant company) had not used every reasonable effort to obtain such permit.

Assuming for the purposes of argument that it was the duty of the defendant company to obtain such permit, I hold upon the evidence that such duty was fulfilled in every reasonable way.

It was manifestly in the interest of the defendant company that such permit should be obtained, as the price stipulated in the contract plus the drawback was somewhat higher than could be obtained in the local market.

The plaintiff had resold the sugar to Sugar Products Company at a considerable profit, and so it was extremely desirable from its standpoint that the contract should be carried out.

After the application for the license to export the 3,000 tons and its refusal by the Trade Commission, there were some negotiations between the plaintiff and the defendant with the object of keeping the contract alive until such times as the conditions or restrictions governing export would be removed or modified, but I do not think the evidence establishes that there was any contract or concluded arrangement between the parties to that effect. The defendant company was endeavouring to assist the plaintiff in its effort to obtain a license or permit and did not insist at the outset upon its right to cancel the contract or to treat it as having been frustrated. However, when it became apparent that no permit or license to export could be obtained during 1919, the defendant company sold its sugar on the local market, so that at the beginning of the year 1920 it had no refined sugar on hand, nor had it any

raw sugar with which to manufacture any supply necessary to carry out this contract.

As already stated, the contract was made for export only, and unless this could be carried out the object of the contract was frustrated. The defendant had done everything in its power to carry out the contract, but was prevented from doing so by its inability to procure a license or permit.

I think the decision in *In re Anglo-Russian Merchant Traders and John Batt & Co. (London) Ltd.*, [1917] 2 K.B. 679, is particularly in point and is conclusive to the effect that in a contract such as the present the implied obligation, if any, on the part of the seller is no higher than that the seller should use its best endeavour to obtain a permit, and that it is necessary, in order to give the contract such business efficacy, that both parties must have intended when they entered into the contract to imply such obligation. In that case, as in the present, there was no absolute obligation to ship, but only in case a license or permit to export could be obtained.

In the present instance the plaintiff did endeavour to have the sugar diverted to some wholesale houses at Prince Albert, Sask., but this was not within the terms of the contract, and I think there was no right in the plaintiff to give such direction, or insist on the defendant complying therewith. In my view, the contract or the object of the contract was frustrated.

On the question of frustration Mr. Tilley has referred to the decision of the Judicial Committee of the Privy Council in *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, [1926] A.C. 108. The doctrine of frustration of contract is fully dealt with by Lord Shaw in delivering the judgment of the Privy Council, at p. 114 of the report, where he states:—

“Frustration can only be pleaded when the events and facts upon which it is founded have destroyed the subject-matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole, so superseded it that it can be truly affirmed that no resumption is reasonably possible.

“It is a mistake to say that the doctrine of frustration is a hard and fast doctrine which can be applied as a general principle in a definite measure to all cases alike. The facts and circumstances of each particular contract, as well as the nature and duration of the interruption to performance, must all be taken into account.”

As already stated, and as the contract provided, the contract

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Wright, J. now under review was for the sale of sugar for export only, and  
1926. it was within the contemplation of the parties, as provided by the  
MAYER agreement, that the delivery should be in the second half of  
AND September, 1919, so that to some extent time was of the essence of  
LAGE INC. the contract.  
v.  
ATLANTIC It would be unreasonable to hold that the defendant company  
SUGAR should retain the sugar in the hope or expectation that at some  
REFINERIES future time the restrictions as to export might be removed, or, in  
LTD. the event of their being maintained, a license to export might be  
obtained. Upon the whole evidence, I hold that the object of the  
contract was frustrated and that the defendant company was  
released from any liability on its part to supply the 3,000 tons of  
sugar remaining due under this contract.

Argument was based upon the term in the contract which provided that where letters of assurance are required before shipment could be made, if through inability to obtain letters of assurance or other permit necessary shipment cannot be made within contract time, the seller reserved the right to either store or resell sugar for account and cost of buyer. To my mind, this is a provision in favour of the seller and to be exercised only at its option. It does not bind the seller in any way to adopt either of the two courses of action mentioned, and the purchaser could not insist on either of these two courses being taken.

In view of the foregoing holding, it is hardly necessary to discuss the effect of the failure of the plaintiff company to maintain an irrevocable credit during all the time when it sought to keep the contract in force. It is claimed that there was some arrangement between the plaintiff and the Royal Bank or its agents that any drafts would be honoured, but there was no notice of any such arrangement to the defendant company, as required by the contract. It would therefore appear that there had been sufficient default in this respect on the plaintiff's part to disentitle it to keep the contract alive or to maintain this action, unless waived by the plaintiff. I do not, however, base my judgment on this ground, but on the first ground dealt with, namely, that the defendant company was released, owing to frustration of the contract.

The action will be dismissed with costs.

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## [APPELLATE DIVISION.]

ESSER V. PRITZKER.

1925.

Nov. 21.

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April 1.

*Mortgage—Covenant for Payment—Covenant of Indemnity by Purchaser of Equity of Redemption—Assignment of—Release.*

R., the mortgagor of land, covenanted for payment of the mortgage-debt. The plaintiff was the assignee of the mortgage; the defendants, the purchasers of the equity of redemption from R., had covenanted to assume the encumbrances on the land; and the plaintiff, in consideration of the assignment to him of that covenant, called "the covenant of indemnity," released R. from all liability upon his personal covenant contained in the mortgage-deed. In this action the plaintiff sought to enforce the covenant of indemnity:—

*Held*, that the mortgage-debt was not wiped out by the release, and the plaintiff was entitled to succeed.

*Smith v. Pears* (1897), 24 A.R. 82, distinguished.

*Campbell v. Morrison* (1897), 24 A.R. 224, and *S.C.*, *sub nom. Maloney v. Campbell* (1897), 28 Can. S.C.R. 228, referred to.

ACTION to enforce a covenant or agreement by the defendants to assume and pay the amount of a certain mortgage as part of the purchase-money of the mortgaged land.

November 19. The action was tried by LOGIE, J., without a jury, at a Toronto sittings.

*H. S. Rosenberg*, for the plaintiff.

*A. Cohen*, for the defendants.

November 21, 1925. LOGIE, J.:—On the 15th June, 1923, Nicholas M. and Anne M. Roberts gave a second mortgage on Toronto lands for \$1,250 to Lilian Scop, who on the 5th July, 1923, assigned it to the plaintiff.

On the 9th July, 1923, the defendants entered into an agreement with Mr. and Mrs. Roberts to purchase the lands covered by the mortgage in question with other lands by way of exchange.

The agreement, which was not under seal, contained the following clause: "Each party hereby covenants to assume the encumbrances (if any) as stated herein on the property conveyed to him by the other."

The mortgage in question was set out shortly in this agreement and in detail in a memorandum attached thereto signed by the defendants.

On the 17th July, 1923, Mr. and Mrs. Roberts conveyed the land to the defendants.

In this deed there was no mention made of any of the encum-

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branches, but on the contrary the grantors covenanted that they had done no act to encumber the said lands.

The defendants' counsel contends, on the authority of *Leggott v. Barrett* (1880), 15 Ch. D. 306, 309, that you cannot go outside of the deed for an implied covenant, and that the agreement containing the so-called express covenant is merged in the higher instrument.

That this argument though ingenious, is fallacious when applied to this case, appears from the judgment of the Second Divisional Court of the Appellate Division in *Disney v. Howich* (1925), 57 O.L.R. 365, where the Court held that the real transaction was to be looked at, regardless of the form in which it was carried out.

The real agreement here was that the defendants were to assume the mortgage in question and pay it as part of the purchase-money: *Campbell v. Douglas* (1915), 34 O.L.R. 580.

Subsequently the defendants sold the lands to one Morton, who, after paying something to the plaintiff, was unable to carry on, and the plaintiff began foreclosure proceedings against Mr. and Mrs. Roberts.

This action was settled by an agreement dated the 19th August, 1924, whereby, in consideration of the conveyance to the Robertses of other lands and a release from all liability upon the covenant in the mortgage in question, the Robertses assigned to the plaintiff all their right, title, and interest in the agreement of the 9th July, 1923, "in so far as the same refers to the assumption by the said Charles M. Pritzker and Rose Pritzker of the mortgage herein firstly referred to (being the mortgage in question herein) and together with the right to sue for and recover any moneys owing under the said mortgage and the full benefit of any right of indemnity by the said parties of the second part (the Robertses) which they may have against the said Charles M. Pritzker and Rose Pritzker by reason of the assumption by them under the terms of the said agreement of the mortgage herein firstly referred to." And on the same day, the 19th August, 1924, the Robertses, by a separate document, assigned to the plaintiff their so-called right of indemnity by virtue of the so-called covenant in the agreement of the 9th July, 1923, against the defendants, and their right to sue for and recover any moneys in pursuance of their alleged right of indemnity.

Now, while the relations of the mortgagee, the mortgagor, and the purchaser who agrees with the mortgagor to assume the mortgage and covenants with the mortgagor to indemnify the latter, are not those of creditor, surety, and principal debtor respectively

(*Trust and Loan Co. v. McKenzie* (1896), 23 A.R. 167, at p. 170), it seemed to me at first blush that the plaintiff in releasing the Robertses from their covenant to pay had destroyed by his own act any cause of action which he might have had against the defendants and took nothing by the assignment, because if all the Robertses had was a right of indemnity they could not be damnified till they were called on to pay by the plaintiff and the plaintiff had released them.

But I am convinced that the effect of the agreement of the 9th July, 1923, went beyond mere indemnity: it was an agreement, for valuable consideration, with the Robertses, to assume and, though the word "pay" is not used, to pay, the mortgage in question.

This agreement is more than an implied covenant in equity to "indemnify and save harmless," and the release of another covenant, viz., that between the Robertses and Scop, assigned to the plaintiff, has no effect to destroy a right contained in the separate and independent agreement between the defendants and the Robertses to pay the mortgage in question.

The amount due is sworn at \$1,171.44, for which the plaintiff may have judgment with costs. But, if the defendants within 15 days elect to have the amount settled by a reference, they may do so at their own risk as to costs, in which event costs and further directions are reserved.

The defendants appealed from the judgment of LOGIE, J.

February 17 and 18, 1926. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*Cohen*, for the appellants, contended that their obligation amounted to a mere implied covenant to indemnify the Robertses, and that, since the plaintiff had released the Robertses from their obligation under the mortgage, the liability of the appellants had ceased to exist. Reference to *Patterson v. Tanner* (1892), 22 O.R. 364; *Smith v. Pears* (1897), 24 A.R. 82.

*L. F. Heyd*, K.C., and *Rosenberg*, for the plaintiff, respondent, argued that the appellants' obligation was, in substance, upon a covenant to pay the mortgage-debt when it became due, and that the release of the Robertses by the respondent did not affect the liability of the appellants. *Smith v. Pears* is distinguishable. Reference to *Carroll v. Provincial Natural Gas and Fuel Co.* (1896), 26 Can. S.C.R. 181; *Smith v. Tennant* (1890), 20 O.R. 180; *Campbell v. Morrison* (1897), 24 A.R. 224.

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Orde, J.A.

April 1. ORDE, J.A.:—The exact point involved in this appeal seems never before to have come up for decision.

The situation is a comparatively simple one. The plaintiff is the holder, under an assignment from the original mortgagee, of a mortgage from one Roberts and his wife; the mortgage contains a covenant for payment of the mortgage-debt. It will be more convenient throughout this judgment to refer to Roberts and his wife as "Roberts."

The defendants are purchasers of the equity of redemption from the mortgagors under an agreement in writing, but not under seal, dated the 9th July, 1923, for the exchange of certain lands. The agreement contains the following provision: "Each party hereby covenants to assume the encumbrances (if any) as stated herein on the property conveyed to him by the other." The mortgage already mentioned was stated to be an encumbrance upon the lands sold by Roberts to the defendants.

Oddly enough, though nothing really turns upon this fact, the subsequent conveyance by Roberts to the defendants was not only not expressed to be subject to the mortgage, but the grantors actually covenanted that they had "done no act to encumber the said lands."

The defendants afterwards sold and conveyed the equity of redemption to one Morton, and have now no interest in the lands, except such as may enure to them if they acquire the mortgage in consequence of their obligation to pay the mortgage-debt now invoked.

Morton having made default, the plaintiff commenced foreclosure proceedings and joined Roberts as a defendant under the personal covenant for payment contained in the mortgage.

On the 19th August, 1924, the foreclosure action was settled as between the plaintiff and Roberts by an agreement under seal whereby Roberts assigned to the plaintiff the benefit of the defendants' agreement of the 9th July, 1923, to assume the mortgage in question (which agreement on their part I shall for convenience hereinafter refer to as the "covenant of indemnity"), and the plaintiff agreed to convey to Roberts certain lands covered by another mortgage (in which the present defendants had no interest) and also released Roberts from all liability under his personal covenant contained in the mortgage in question herein.

On the same day, by a separate instrument, Roberts assigned to the plaintiff the benefit of the defendants' covenant of indemnity. The purpose of this separate instrument is not explained. It neither adds to nor detracts from the assignment embodied in the

larger instrument. It may have been intended to be used as evidence of the assignment without disclosing the release and so prevent if possible the very defence raised in the present action.

The plaintiff now seeks, under the assignment thereof to him, to enforce the covenant of indemnity against the defendants, and judgment in his favour was given at the trial by Logie, J., for \$1,171.44 and costs. From that judgment the defendants now appeal, the sole ground as set forth in their notice of appeal being "that the liability of the defendants, if any, rested upon an implied covenant to indemnify Roberts, and, Roberts having been released from his covenant to pay, the defendants' liability was wiped out."

Upon the argument counsel for the defendants urged that the express agreement to assume the mortgage had become merged in the covenant to indemnify to be implied, as he put it, from the subsequent conveyance. His reason for pressing this point was based upon the theory that in some way such an implied covenant would be narrower in its scope than the wider terms of the earlier agreement "to assume" the mortgage.

Whether or not the terms of the express agreement would become merged in an obligation merely arising by implication it is not necessary to determine. For, while an obligation on the part of the grantee to indemnify the grantor when the conveyance is expressed to be subject to a mortgage is implied (*Waring v. Ward* (1802), 7 Ves. 332, at pp. 336 and 337; *Thompson v. Wilkes* (1856), 5 Gr. 594, at p. 595; *British Canadian Loan Co. v. Tear* (1893), 23 O.R. 664), how, in a conveyance in which the grantor expressly covenants that he has done no act to encumber the lands, an obligation to indemnify the grantor against an encumbrance which he himself had in fact created can arise *by implication*, constitutes a proposition so absurd as to answer itself by merely stating it.

In the present case the obligation to indemnify Roberts, or to pay off the mortgage-debt, must of necessity arise either out of the express language of the covenant of indemnity in the agreement of the 9th July, 1923, or from the fact that it was a term of the bargain between the vendors and the purchasers of the equity of redemption that the assumption of the mortgage by the purchasers formed part of the consideration passing to the vendors: *Disney v. Howich*, 57 O.L.R. 365.

There is no attempt by the defendants to set up the express covenant against encumbrances in the subsequent conveyance. Had they done so, it is possible that all evidence of the agreement of the 9th July, 1923, might be inadmissible as tending to contradict

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the express language of the formal conveyance, until some steps had been taken to reform the latter. But the agreement was given in evidence without objection, and for the purpose of the present case the fact that the defendants were bound to indemnify Roberts in respect of the personal covenant in the mortgage was taken for granted, the sole questions in dispute being as to the scope of the defendants' obligation and whether or not it was discharged as a result of the plaintiff's release of Roberts.

Mr. Cohen urges with much force that the obligation of the defendants to assume the mortgage is at most but a covenant of indemnity and that the release by the plaintiff, as mortgagee, of Roberts from his personal covenant to pay the mortgage-debt extinguishes the very debt in respect of which the covenant of indemnity was taken, thereby leaving nothing for the covenant to operate upon, and so discharging the defendants. He relies upon the judgment in *Smith v. Pears*, 24 A.R. 82, for his contentions both as to the scope of the covenant of indemnity in the agreement of the 9th July, 1923, and as to the effect of the plaintiff's release of Roberts. In my judgment, *Smith v. Pears*, in spite of certain points of resemblance, is distinguishable from the present case. But the discharge of the mortgagor from all further liability for the mortgage-debt, in consideration of the assignment to the mortgagee of a covenant of indemnity given by the purchaser of the equity of redemption, presents a situation which, as I have said, is quite novel and calls for careful consideration.

In *Smith v. Pears*, A., the mortgagor, sold the equity of redemption to B., who in turn sold to C., each sale being made subject to the plaintiff's mortgage. C. sold to Pears, the defendant, taking from Pears an express covenant to pay the mortgage and to indemnify and save him (C.) harmless from all loss, etc., in respect thereof. Default having been made in payment of the mortgage-debt, the plaintiff procured from C. an assignment of Pears' covenant, and sued Pears. He was met by way of defence with two assignments which Pears had procured to himself from A. and B. of the implied covenants of indemnity which they held from B. and C. respectively. It was held by the trial Judge and by the Court of Appeal that Pears' covenant to C., though in terms a covenant to pay the mortgage-debt, was in substance a covenant to indemnify C. against his personal liability; and that, as the plaintiff as mortgagee had no recourse against C., whose sole liability was an obligation to indemnify B., the assignment by B. to Pears effectively precluded the mortgagee from recovering against Pears.

It was urged before us, upon the authority of this decision, that



the agreement to assume the mortgage was no more than a covenant of indemnity, and that by releasing Roberts, and thereby freeing him from all further obligation for the mortgage-debt, the defendants' covenant of indemnity was no longer effective, and could not be enforced.

This reasoning is, in my judgment, unsound. There is a vital distinction between the position of the mortgagee in the *Pears* case, and that of the plaintiff here. In the one case there was no privity between C. and the mortgagee, C.'s liability being solely to B., his immediate vendor; while here Roberts as mortgagor was directly liable to the plaintiff for the mortgage-debt.

It is not really of much consequence here whether the defendants' obligation to Roberts is called a covenant to pay the mortgage-debt or a covenant of indemnity. There are, doubtless, cases where it may be important to determine whether or not a covenant is merely to indemnify or to pay a sum of money in any event. What has to be considered is the subject-matter of the obligation. In the *Pears* case, while the covenant in terms required Pears to pay the mortgage-debt, the covenantee was not himself liable to the mortgagee, and the covenant, in the circumstances, was held to be a covenant of indemnity merely. But when, as in the present case, the covenantee is directly liable to the mortgagee for the mortgage-debt, a covenant to assume the mortgage, even if termed a mere covenant of indemnity, amounts in substance to a covenant to pay the mortgage-debt when due, because to give it any narrower meaning is to strip it of all its efficacy as a protection to the covenantee. That it has this wide meaning is clear from the authorities, under which the covenantee is entitled to enforce it as soon as the debt is due without waiting to be sued and without being obliged himself first to pay the debt: *Campbell v. Morrison*, 24 A.R. 224, at p. 229.

There is a great deal in the judgment of Maclellan, J.A., in the last mentioned case, and of King, J., in the Supreme Court of Canada, where the case is reported as *Maloney v. Campbell* (1897), 28 Can. S.C.R. 228, which assists in arriving at a right conclusion in the present case. It was strenuously argued in that case that the equitable obligation of a purchaser of land subject to a mortgage to indemnify the vendor was a covenant of indemnity merely personal to the covenantee, and could not be assigned. King, J., deals with this at p. 233 in the following words:—

“Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by

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1926. money demand is no more personal in this sense than is one to  
indemnify against payment of a definite and matured liability or  
an agreement to pay a sum of money for another."

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The complete assignability of a covenant to indemnify a mortgagor given by the purchaser of the equity of redemption, even when the obligation arises merely by implication, is well and firmly established, and the right, upon default in payment of the mortgage-debt, to enforce it either by the original covenantee or by the mortgagee to whom it has been assigned, independently of any action against the mortgagor, is made clear by the judgment in the case just referred to (24 A.R. at p. 229).

It must, however, always be kept in mind, when discussing the rights of an assignee of a chose in action, that as a general rule he stands in no higher position than the assignor, and that all the defences against the assignor are available against the assignee. The assignor takes the assignment "subject to the equities." Warren on Choses in Action (1899), p. 104 *et seq.*; the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 49. And it was this principle which intervened in *Smith v. Pears* to protect the defendant. All that C., who was Pears' immediate vendor, could assign to the mortgagee was Pears' covenant to indemnify C. against his liability to B. Holding as he did an assignment from B. of C.'s covenant, Pears had a complete defence against C., and therefore as against the mortgagee.

No such situation has arisen here. Had Roberts merely assigned the defendants' covenant to the plaintiff, the latter might, upon default under the mortgage, have sued either Roberts or the defendants or both. Had he sued the defendants alone, they could not have required the plaintiff to join Roberts as a party. The defendants could have no recourse over against Roberts, either as jointly liable or otherwise, though they were entitled to raise such defences against the plaintiff as were available against Roberts had he been plaintiff; and possibly as incidental to such defences, but not otherwise, to bring Roberts into the action.

It is of course trite law that prior to an assignment of a covenant of indemnity, the relationship of the parties is not that of creditor, debtor, and surety. But upon the assignment, while technically that relationship is still lacking, the rights of the parties are so analogous that they are governed in many respects by the law respecting suretyship. There is now a *nexus* or privity between the one who ought to pay the debt and the creditor-mortgagee, and the original debtor has become in effect a surety

entitled to look to the covenantor for payment and to the protection of the securities in the hands of the mortgagee.

That being the case, upon what principle can it be said that the mortgagee may not release the mortgagor from all personal obligation? The principal debtor can never complain because the creditor sees fit to release the surety against whom the debtor would have no recourse. Suppose in the present case the plaintiff, after procuring an assignment of the defendants' covenant, had sued both Roberts and the defendants in the same action, might he not have later abandoned the action as against Roberts, or even released him, without affecting or prejudicing his cause of action against the defendants? To say that when the plaintiff released Roberts from his covenant to pay the mortgage, the subject-matter of the covenant of indemnity disappeared, is merely juggling with words. The subject-matter of the covenant is the money owing to the mortgagee, the debt secured by the mortgage. It would be just as plausible for the present owner of the equity of redemption to set up in an action to foreclose the mortgage that the debt had disappeared by reason of the release of Roberts and that he was therefore entitled to a discharge. The mortgagee is still entitled to recover payment of the mortgage-debt, and I see no ground, either legal or equitable, for giving effect to the highly technical and inequitable proposition put forward by these defendants.

If this assignment had been made prior to the statute facilitating the assignment of choses in action, and the mortgagee had been obliged to sue in the name of the assignor, one cannot imagine Lord Hardwicke or Lord Eldon giving effect to the argument against the plaintiff's right in equity to recover. I think they would have answered the argument of the defendant by saying that it could be of no consequence to the defendants if the mortgagee saw fit to release some one against whom the defendants could have no recourse, and would have fixed the liability for the mortgage-debt upon the party who, so far as the plaintiff was concerned, ought to pay the debt.

There is a further aspect of the present case which tends to strengthen the conclusion at which I have arrived. The mortgagee here took steps to enforce payment of the covenant given by Roberts, the mortgagor. Roberts approaches him and says in effect: "It is true I am liable to you, but I have a covenant of indemnity from the Pritzkers. They are able to pay, and the only result of your suing me will be that I shall be obliged to recover over against them either in your action or in a separate one. I am willing to let you go directly against them if you will release me

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App. Div. from further liability." Now what possible objection can there be  
 1926. to that? Instead of treating the release as wiping out the mort-  
 ESSER v. gage-debt, what really took place was a method of enforcing pay-  
 PRITZKER. ment, and I can see no principle, either legal or equitable, which  
 Orde, J.A. has been violated by an agreement which releases the mortgagee  
 from personal liability in exchange for an assignment of a covenant  
 of indemnity given by one who, so far as the mortgagor is con-  
 cerned, ought to pay the mortgage.

For these reasons, I am of opinion that the appeal should be dismissed.

LATCHFORD, C.J., and RIDDELL, MIDDLETON, and MASTEN, JJ.A., agreed that the appeal must be dismissed with costs.

*Order accordingly.*

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[APPELLATE DIVISION.]

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STEVENSON V. GREEN.

April 1.

*Mechanics' Liens—Priorities between Second Mortgagee and Lienholders—Increased Selling Value of Land—Original Value—Separate Properties—Application of Principle of Marshalling—Deficiency in Security—Ratable Apportionment—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 8(3) and (4) (8 Geo. V. ch. 29, sec. 4)—Rule where Increased Value Partly Occasioned by Work of Others not before the Court.*

The defendant G. began the erection of five houses on his land, and advances were made upon first mortgages to enable him to build. The first mortgagees' advances formed a first charge upon the several properties, both land and buildings, in priority to the claims of the defendant B., the second mortgagee, and of three claimants of liens under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, and amendments. The defendant G. became insolvent and made an assignment under the Bankruptcy Act on the 15th September, 1923. At that time the houses were in various stages of completion, but none of them was finished. B., as second mortgagee, took possession and completed them. B.'s mortgages were, as regards the liens of the three claimants, "prior mortgages" within the meaning of the Act, so that the liens would, in ordinary circumstances, have priority over them only to the extent to which the selling value of the land had been increased by the work done and materials furnished by the lienholders. In an action brought by the lienholders to enforce their claims, the Assistant Master who tried the action charged the amounts payable on the first mortgages against the land to the full extent of the value ascribed to the land, and charged the residue only of the amount of those prior mortgages against the increased selling value arising from the buildings, thus leaving a balance of "increased selling value," on which, he found, the amount of the lienholders' claims attached as a charge prior to the second mortgages. The liens were thus paid in full, and the deficiency in the security fell entirely upon B., the second mortgagee:—



*Held*, upon appeal, that in dealing with the priorities it was necessary to apply the principles of equity relative to the marshalling of securities, and for that purpose to consider the incorporeal interest which the statutes creates under the name of "increased selling value," as a quasi-estate in the land, in contradistinction to the estate or interest held by the mortgagees and the estate of the owner of the equity of redemption; and, in the circumstances of this case, the claims of the first mortgagees must, as between B. and the lienholders, be apportioned so as to rank ratably on the original value of the lands and on the "increased selling value," considered as separate properties, the apportionment to be ratable in proportion to the respective values of the two interests.

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The provisions of sec. 8, subsec. 3, of the Act, and subsec. 4, as added in 1918 by 8 Geo. V. ch. 29, sec. 4, considered, and the construction given to them in *Kennedy v. Haddow* (1890), 19 O.R. 240, *Patrick v. Walbourne* (1896), 27 O.R. 221, *Cook v. Koldoffsky* (1916) 35 O.L.R. 555, and *Hickey v. Stalker* (1923), 53 O.L.R. 414, adopted.

The Assistant Master's judgment was varied in accordance with the above, and in some other respects.

By the Assistant Master's judgment, the lienholders were given priority over B. for the whole sum expended by them on the buildings for labour and materials, regardless of the extent to which such expenditure increased the selling value:—

*Held*, that, as against the mortgagee, a lienholder's right to rank in priority on the increased selling value can only be to the extent to which that value has been increased by the work done, or materials supplied, *by him*.

*Bank of Montreal v. Haffner* (1882-4), 3 O.R. 183, 189, 10 A.R. 592, 599, and *Security Lumber Co. v. Duplat* (1916), 29 D.L.R. 460, followed.

APPEAL by the defendant Becker from the judgment of an Assistant Master in a mechanic's lien action.

March 1. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*Joseph Singer*, for the appellant.

*D. O. Cameron*, for the plaintiff and other lienholders, respondents.

*J. P. Walsh*, for the trustee in bankruptcy and some creditors of the defendant Green.

April 1. MASTEN, J.A.:—Appeal by Jacob Becker, second mortgagee, from the judgment of E. W. Boyd, Esq., Assistant Master, dated the 21st March, 1925. The respondents are three lienholders, viz., Stevenson and Cameron (the plaintiffs), the Wardfold Manufacturing Company, and the Canada Hardware Company Limited. Neither Green nor the first mortgagees appear.

The appellant attacks the validity of the liens, the amounts found due, the *quantum* of the increased selling value, and the priority accorded to the lienholders, as will hereafter appear more fully.

The facts are rather complicated, but, in so far as they are



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1926. stated as follows:—  
STEVENSON In September, 1922, the defendant Green bought a considerable  
v. tract of vacant land in Toronto, on a portion of which he proceeded  
GREEN. to erect five houses. These houses and the lands on which they  
Masten, were built form the subject-matter against which the parties to  
J.A. this appeal hold their several securities.

Without dealing with earlier transactions which seem to be irrelevant to the questions here at issue, the following mortgages now subsist against these houses: first, five several first mortgages held as to four of the houses by the Huron and Erie Mortgage Corporation, and as to the fifth by the Consolidated Trusts Corporation or its assigns.

The advances on these five mortgages were made to enable Green to build, and they aggregate \$14,733. It is admitted by the appellant and by all the respondents on this appeal that this sum forms a first charge on the several properties, both land and buildings, in priority to the claims both of the appellant and of the respondents.

The appellant Becker, as second mortgagee, holds five several second mortgages on the houses in question—four for \$1,500 each and one for \$875. These mortgages were given in partial substitution for an earlier mortgage securing \$30,000, covering this and other lands. Partial discharges were given of the earlier mortgage, and these mortgages, aggregating \$6,875, were given in substitution. It is not in controversy that these mortgages are, as regards the mechanics' liens of the respondents, "prior mortgages" within the meaning of the Mechanics and Wage-Earners Lien Act, so that the liens would under ordinary circumstances have priority over them only to the extent to which the selling value of the land has been increased by the work done and materials furnished by the several lienholders.

Neither is it in controversy that no advances were made by the appellant after the work commenced; nor, in computing the amount by which the selling value of the lands has been increased, does it become of importance to settle the exact date at which such increased selling value is to be ascertained. Counsel for the appellant submits that the estimate should be as of the date when the appellant took possession rather than at the date when the last work was done or when the defendant Green abandoned the work, but counsel agree that the precise date is immaterial, as the period of time which intervened between such dates was only three months, and no appreciable change in value took place during that period.

The claim for principal due to the second mortgagee on his five mortgages is ..... \$6,875.00  
 The amount of interest and costs has not been computed.  
 The value of the land at the date when work commenced, viz., the 6th December, 1922, is found by the Master at ..... 8,877.00  
 And this figure seems to be uncontroverted.  
 He estimates and finds the increased selling value at 11,300.55  
 This last figure is questioned.

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The three respondents claim to have supplied work or materials or both for some of these houses during a period beginning on the 6th December, 1922, and ending about the end of July or 1st August, 1923. The Assistant Master has found them entitled to liens as follows:—

Cameron & Stevenson, registered 9th July, 1923.....\$2,324.93  
 Canada Hardware Company Ltd., registered 1st August,  
 1923 ..... 278.22  
 Wardfold Manufacturing Company, registered 17th  
 August, 1923 ..... 463.64

The validity of the lien of the Canada Hardware Company and the *quantum* found due on each of these liens are attacked by the appellant on this appeal. The Master also finds that all these liens attached before the Mechanics and Wage-Earners Lien Act of 1923 came into force, so that the rights of the parties are to be determined under the former law, R.S.O. 1914, ch. 140, and amendments.

The defendant Green became insolvent and made an assignment under the Bankruptcy Act on the 15th September, 1923. At that time the five houses were in various stages of completion, but none of them was finished. No sale of the premises has occurred, but the appellant, as second mortgagee, has taken possession and completed the buildings.

By orders made by the Assistant Master, pursuant to the consent of the respondents, Becker, the appellant, paid into court on or about the 26th June, 1924, the sum of \$3,300 to answer the claims of the respondent lienholders in case the same were established, and the liens were on that date vacated by the Master's order. The result is that the present appeal relates to the disposition of this sum of \$3,300 now standing in court to the credit of this action.

The Master has charged the amounts payable on the Huron and Erie mortgages and on the Consolidated Trusts mortgage against the vacant lands to the full extent of the value ascribed to

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those lands, namely, \$8,877, and has charged the residue only of these prior mortgages against the increased selling value arising from the buildings, thus leaving a balance of "increased selling value," on which he finds that the lienholders' claims of \$3,066.79 attached as a charge prior to the second mortgages. The result is that the liens are thus paid in full, and the deficiency in the security falls entirely on the shoulders of the second mortgagee.

Before dealing in detail with the several grounds of appeal, it will be convenient to ascertain as clearly as possible from a legal standpoint the exact question on this appeal. The provision of the Mechanics and Wage-Earners Lien Act governing the matter is found in R.S.O. 1914, ch. 140, sec. 8, subsec. 3, and reads as follows:—

"Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge."

To this provision there was added, in 1918, a new subsection (4) set forth in ch. 29, sec. 4, of the Ontario statutes of that year (8 Geo. V.), which reads as follows:—

"The selling value of land incumbered by a prior mortgage or other charge, shall be deemed to be increased by the value of the work or service performed upon and of the material furnished or placed thereon or adjacent thereto."

The priorities created by the statute were very clearly expounded by the late Chancellor Boyd in *Kennedy v. Haddow* (1890), 19 O.R. 240, 243, where he says:—

"The only sound principle of construction which recommends itself to me is to hold in the case of a registered prior mortgage affecting land and buildings, and a mechanic's lien for subsequent work thereon, that the mortgage should retain its priority to the extent of the value of the security, before the work is begun, in respect of which the lien attaches: and that the lien should have priority only to the extent of the additional value given by the subsequent improvements."

The view so expressed has since been approved and applied in *Patrick v. Walbourne* (1896), 27 O.R. 221, at p. 228, and in *Cook v. Koldoffsky* (1916), 35 O.L.R. 555, at p. 559.

The interpretation of the amending Act quoted above was determined by this Court in *Hickey v. Stalker* (1923), 53 O.L.R. 414,

which lays it down that the "value" referred to in that statute is not that which represents the actual value or cost of the work or material in itself, but the amount which it adds to the selling value, and the actual value or cost of the work and material is to be taken as the increased selling value of the land unless and until it is proved that it is not.

It is to be borne in mind, therefore, that on the present appeal the question is not, what was the actual value or cost of the work and material supplied by the lienholders? but, as between the mortgagee and the lienholder, how much did the work and material increase the selling value of the property?

Turning now to the separate grounds of appeal mentioned in the appellant's notice, grounds 1, 2, 3, and 5 are as follows:—

1. The said judgment was contrary to law and contrary to the weight of evidence.

2. That the learned Assistant Master erred in finding that the plaintiffs Stevenson & Cameron were lienholders.

3. That the learned Assistant Master erred in finding that the plaintiffs Stevenson & Cameron did not keep a general account for work done and material supplied by them to the defendant Samuel B. Green.

5. That the learned Assistant Master erred in finding that the Canada Hardware Company Limited were entitled to a lien.

As I understand the notice of appeal and the oral argument, these several grounds of appeal relate to the existence and extent of the liens as against Green, and not to their priority or extent as against the mortgagee, and as to them I am of opinion that the appeal should be dismissed. Each of the lienholders is entitled to a lien and as against the owner, and I see no grounds for varying the Master's finding as to *quantum*. The Master's findings are based on conflicting evidence, and no adequate reason for reversing his conclusions, either as to the validity or *quantum*, was pointed out in argument or appears by the evidence; and the evidence of Roberts, a witness called by the appellant, lends considerable support to the Master's finding on *quantum*.

Ground 4 relates to the *quantum* of the liens as against the mortgagee, and reads as follows:—

4. That the learned Assistant Master erred in finding that the Wardfold Manufacturing Company was entitled to rank on the increased value for materials sold by it to the defendant Samuel B. Green, in that the said materials did not remain on the ground, and were not incorporated or used in connection with the buildings erected on the lands covered by its lien in this action, and which did not create any increased value on the said lands.

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On the argument a similar point was taken for reduction of the *quantum* of the lien of the Canada Hardware Company.

With respect to this, I think that, in ascertaining the sums for which the Canada Hardware Company and the Wardfold Manufacturing Company are entitled to priority over the mortgages, the learned Master has failed to make a proper application of the statute as it has been interpreted.

Dealing with the lien of the Canada Hardware Company Limited, the judgment of the Master is as follows:—

“Canada Hardware Company Limited registered a claim for \$278.22 on the 1st August, 1923, against lots 140, 141, and 142 (only), plan 895. These both embrace the lands upon which 152 Heath street and 9 and 11 Cornish road have been erected, and do not touch the lands upon which houses 13 and 15 Cornish road stand. The evidence of the claimant is most unsatisfactory, but I cannot help concluding that I have sufficient to find that the materials were ordered for the houses (9 to 15 Cornish road, and not 152 Heath street). Green was building at the corner or near the corner of Cornish road and Heath street, and material was delivered there for the purposes of the buildings; and in coming to this conclusion I am largely depending upon the evidence that this claimant was invited to remove the finishing hardware, and decided on proper grounds that it could not avail itself of the offer; also on the fact proved that accounts were rendered monthly and no exception taken by Green. The fact that Harry Imrie honestly admitted that he did not know what was in parcels he delivered, and could not, at the trial, state that he knew the men who signed his delivery-slips, does not, I think, in view of these other facts, force me to make a finding of no delivery proved, and I find a claim proved for \$278.22, confined to houses 9 and 11 Cornish road, and not applicable to 152 Heath street or to 13 or 15 Cornish road.”

Upon the evidence it is clear that the box of finishing hardware invoiced at \$115 was never incorporated into the buildings, for it remained intact as a box of material after all work ceased. It has now disappeared. What became of it does not appear, and the loss must be borne by the claimant the Canada Hardware Company Limited: *Patrick v. Walbourne*, 27 O.R. 221. I would find as a fact upon the evidence that at the date of abandonment this box of hardware did not give any increased selling value to these lands. As to the remainder of this claim, I am unable to find that the right to a prior lien which the statute *primâ facie* creates has been displaced by the appellant. I therefore find that, as between the

appellant mortgagee and the Canada Hardware Company Limited, the claim of \$278.22 allowed by the Master is to be reduced by \$115. I pause here to note that, as this circumstance was not taken into consideration by the Master when fixing the total of the increased selling value, it should now be deducted from the amount found by him.

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With respect to the lien of the Wardfold Manufacturing Company Limited, the Master says: "I am satisfied from the whole evidence that the Wardfold goods, save this \$62.70, were all sold and delivered on the premises in question for houses 9 and 11, and that the claim is proved for \$463.64."

After perusing the evidence of the witnesses Roberts, Wilson and Calder, Parrot and Cook, it seems to be clear that this lien exists only against houses 9 and 11 on Cornish road, though other lands are described in the lien as registered. As against Green, the lien may be good for the sum allowed by the Master, but it is clear that, no matter what lumber was delivered, none of the "trim" in question was ever built into house 11, and that the selling value of house No. 9 was originally increased by this material to the extent of not more than \$200. As against the appellant mortgagee, the Wardfold Manufacturing Company is entitled to a lien for \$200, less the reductions to be mentioned in ground 8. The deduction is therefore \$263.64, on the same principles and with the same results following as apply to the Canada Hardware Company Limited.

Ground of appeal No. 8 reads as follows:—  
"8. That the learned Assistant Master erred in fixing the amount by which the work done and materials supplied increased the value of the said lands."

The Master has found that the total cost of the work and materials that entered into houses 9 and 11 Cornish road was ..... \$6,993.42  
For reasons stated under ground 4 this should be diminished by \$115 for hardware and \$263.64 for lumber known as "trim" ..... 378.64  
\$6,614.78

He then deducts \$260 for physical depreciation ..... \$260.00  
and makes a further deduction of 10 per cent. on account of the fact that the houses had lost market value because they had become stigmatised in the real estate market as abandoned and unfinished.

On this point the Master says, in his reasons for judgment:—

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“The sum of \$6,732.82 is the increased value, unless some deduction must be made owing to the condition of the market and the fact that the houses are stigmatised as unfinished houses. The expert evidence greatly differs on this point. On one side it is contended that there should be no deduction, whatever, and on the other hand it is said that 50 per cent. must be taken off five minutes after the work is abandoned, and that, the market having greatly fallen, the property became practically unsaleable. It is very difficult to determine, where there can, as here, be no test by sale (since the mortgagee has completed the buildings), what a proper allowance is; and, in view of the fact that the statute of 1918, under which this case is being tried, measures the increased value, in the absence of evidence in refutation, at the cost of the work, I am not at all clear that I should not be justified here in disregarding altogether all the evidence given, which I cannot but regard as extreme on both sides, and in following the rule of the statute as if no evidence in refutation were given; but I also feel that this would, perhaps, not be quite reasonable, and I have concluded that a deduction of 10 per cent. or \$673.28 should be made, and the increased value so fixed at \$6,059.54.”

A perusal of the evidence of Roberts, Wilson, Calder, Parrot, and Cook convinces me that in this estimate the learned Assistant Master has leaned quite too liberally in favour of the lienholders in making a reduction of no more than 10 per cent. While the figure is largely a matter of estimation (not to say guess-work), I would, relying largely on the evidence of Roberts, increase this deduction to 20 per cent. I pause here to quote from the Assistant Master's reasons for judgment where he says: “Here, as in the case of the replacement values, there is great difference of opinion. I have placed, as to this portion of the evidence, more reliance on what has been said by the witness Roberts than on the evidence of any of the others.” I would therefore ascertain the true increased value of houses 9 and 11 Cornish road as follows:—

The deductions from the liens of the Canada Hardware Company and the Wardfold Company reduce the increased selling value to .....		\$6,354.78
Deducting from this 20 per cent. as above mentioned, namely .....		1,270.95

---

Leaves as the increased selling value of these houses.. \$5,083.83

For the like reasons I would increase the deduction in the selling value of 152 Heath street from 10 per cent. to 20 per cent., and the figures will be:—

Original cost at abandonment .....	\$2,396.34	App. Div.
Physical deterioration .....	76.00	1926.
	<hr/>	
	\$2,320.34	STEVENSON
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		GREEN.
From which I would deduct 20 per cent. instead of 10		<hr/>
per cent. ....	464.07	Masten,
	<hr/>	J.A.
Leaving the increased selling value at .....	\$1,856.27	
In the case of Nos. 13 and 15 Cornish road, I do not think the evidence justifies interference with the Master's finding, and the increased selling value of these houses stands as found at \$3,153.		
Summarising the results as to increased selling value, they are:—		
1. 9 and 11 Cornish road .....	\$5,083.83	
2. Heath street .....	1,856.27	
3. 13 and 15 Cornish road .....	3,153.00	
	<hr/>	
Total.....	\$10,093.10	

Grounds of appeal Nos. 6, 9, 10, and 11 read as follows:—

“6. That the learned Assistant Master erred in finding that Stevenson and Cameron, the Wardfold Company, and the Canada Hardware Company Limited were entitled to have their claims rank in priority to the claim of the second mortgagee, Jacob Becker.”

“9. That the learned Assistant Master erred in finding that the first mortgagees must first deduct from the amount of the advances made by them under their mortgage the value of the land upon which the buildings were erected, before charging the amount of such advances against the increased value.

“10. That the learned Assistant Master erred in finding that there were any funds available out of which to pay the claims of the lienholders.

“11. That the learned Assistant Master erred in finding that the value of the lands covered by the liens should be used for the benefit of the said lienholders in priority to the claim of the second mortgagee, Jacob Becker.”

These four grounds appear to me to state in varying forms an identical contention, namely, that the Master should have applied the increased selling value, as found by him, in reduction of the charges of the Huron and Erie Company and the Consolidated Trusts Company, and so should have, to a certain extent, left the original lands to answer the claim of the appellant under his second mortgage. In other words, as stated by Mr. Singer in his argu-



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ment, the building advances of the first mortgagees exceed the amount of the increased selling value, and in consequence the liens are wiped out and have no priority over the Becker mortgage, which therefore stands first.

Counsel for the appellant submitted that this contention was supported by the judgment of this Court in the case of *Stinson v. Mackendrick* (1924), 55 O.L.R. 358. I was a member of the Court which rendered that decision, and after a re-perusal of the judgment and conference with my brother Middleton, who wrote it, I have no hesitation in saying that our decision on that case has no bearing whatever on the question now under consideration.

I am able to agree neither with the contention of counsel for the appellant nor with the method adopted by the learned Master.

It seems to me that in dealing with the priorities, where there is a first charge covering both interests and two subsequent charges with differing and kaleidoscopic priorities against the several interests, it becomes necessary to invoke and apply the principles of equity relative to the marshalling of securities, and for that purpose to consider the incorporeal interest which the statute creates under the name of "increased selling value," as a quasi-estate in the lands in question, in contradistinction to the estate or interest held by the mortgagees and the estate of the owner of the equity of redemption. While the property in question (land and buildings) is physically one, and the value realisable on sale, its selling value, is necessarily single, yet for the purpose of ascertaining the incidence and priorities of the several charges to which the property is subject it is necessary to carry in mind the effect of the Mechanics and Wage-Earners Lien Act in creating and carving out an incorporeal subject-matter, viz., "the increased selling value," and in declaring, as between the claims of mortgagees and the claims of lienholders, the priorities of the mortgage in regard to the original property and the prior charge of the liens on the increased selling value.

In the present case Becker holds mortgages aggregating \$6,875, forming a prior charge on the vacant lands and a subsequent charge on the increased selling value. The lienholders' claims (as against the interest of Green) aggregate \$3,066.79; but, as prior claims increasing the selling value, they aggregate only \$2,688.15, owing to deductions of \$115 and \$263.64 under ground 4. These liens form a charge prior to Becker's of \$2,688.15 on the increased selling value, but a charge of \$3,066.79 subsequent to Becker's on the whole property.

The first mortgagees hold claims prior to Becker's and prior to

the lienholders', aggregating \$14,733, and covering both the lands and the buildings as a first charge.

I think that under these circumstances the claims of the first mortgagees must, as between Becker and the lienholders, be apportioned so as to rank ratably on the original value of the lands and on the "increased selling value," considered as separate properties, the apportionment to be ratable in proportion to the respective values of the two interests: *Barnes v. Racster* (1842), 1 Y. & C. Ch. 401; *Flint v. Howard*, [1893] 2 Ch. 54, at p. 61 and at pp. 69 and 72; *Storey's Eq. Jur.*, 3rd Eng. ed., paras. 663a and 633b.

The principle of marshalling is applicable whether the properties forming the security be land or personalty or partly one and partly the other: *In re Athill* (1880), 16 Ch. D. 211; *In re Burge Woodall & Co.*, [1912] 1 K.B. 393; *Baldwin v. Belcher*, *In re Cornwall* (1842), 3 Dr. & War. 173.

I proceed to apply this principle to the facts of the present case. Now the original value of the lands is found to be..... \$8,877  
The increased selling value I have reduced to ..... 10,093

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Total value of lands and buildings..... \$18,970

Upon the principle of marshalling securities, the advances of the first mortgagees, namely, \$14,733, are therefore to be apportioned as follows:—

$\frac{8877}{18970}$  against the lands and  $\frac{10093}{18970}$  against the increased selling value.

This results in \$6,895.34 becoming chargeable against the original value of the land and \$7,838.66 chargeable against the increased selling value.

Deducting from total increased selling value, viz., \$10,093.00 the portion of first mortgages chargeable against it.. 7,838.66

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Leaves a residue of ..... \$ 2,254.34  
on which the lienholders have a prior claim to the extent to which the selling value has been increased by their respective contributions.

The liens have been allowed by the Master in full as follows:—

Cameron & Stevenson .....	\$2,324.93
Canada Hardware .....	278.22
Wardfold . . . . .	463.64

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Making a total of ..... \$3,066.79

I have already found that as against the appellant mortgagee this total should be reduced as follows:—

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App. Div.	Canada Hardware .....	\$115.00
1926.	Wardfold .....	263.64
		<hr/>
STEVENSON	Total reduction .....	\$378.64
v.		
GREEN.	because it did go into the buildings or create an "increased selling	
Masten,	value;" thus leaving the total of the liens entitled to rank in	
J.A.	priority on the increased selling value at \$2,688.15.	

There is therefore a deficiency in this fund upon which the lienholders are entitled to rank in priority, and the lienholders will therefore share *pro ratâ* in this fund of \$2,254.34 according to the amounts of their respective liens as now found by this Court.

It remains to consider the 7th ground of appeal, viz., "that the learned Assistant Master erred in finding that the lienholders were entitled to have their claims rank on the increased value of work done and materials supplied by persons other than those claiming in this action."

By the judgment in appeal the lienholders are given priority over the mortgagee for the whole sums expended by them on the buildings for labour and materials, regardless of the extent to which such expenditure increased the selling value. That is not what the statute provides.

The true rule was first enunciated by Proudfoot, J., in *Broughton v. Smallpiece* (1877), 25 Gr. 290, at p. 293. It was re-stated by Ferguson, J., in *Bank of Montreal v. Haffner* (1882), 3 O.R. 183, at p. 189, in these words: "Each lien under the Act must stand upon its own footing, every lienholder being entitled to security upon the enhanced value arising by reason of his work and materials." His judgment was reversed in the Court of Appeal (1884), 10 A.R. 592, because the lienholders' action was not brought in 90 days, but the rule now under consideration was approved by Osler, J.A., at p. 599.

The rule is discussed at length and the Ontario cases are approved and applied by the Court of Appeal for Saskatchewan in the case of *Security Lumber Co. v. Duplat* (1916), 29 D.L.R. 460. I would adopt the views of Haultain, C.J., as expressed in that case. The rule is also well stated by Lamont, J., as follows (p. 463):—

"As against the mortgagee, a lienholder's right to rank in priority on the increased selling value can only be to the extent to which that value has been increased by the work done, or materials supplied, by him."

He gets his proportion out of the increased selling value, and gains no priority in respect of another mechanic's work. In apply-

ing the rule I prefer the method of computation adopted by Haultain, C.J., in the *Duplat* case, where he says (p. 462) :—

“I do not agree with the contention of Mr. Gordon that the amounts paid on account by the owner before action were paid for the benefit of the mortgagee.”

Under this rule the formula applicable is as follows:—

“As the value of the whole material and work on these five houses is to the total of the material and work supplied by these three lienholders, so is the total increased selling value to that of the increased selling value which belongs to these three lienholders.”

The whole expenditure for work and material in connection with these five houses, as found by the Master, was as follows:—

Nos. 9 and 11 Cornish road .....	\$6,993.42
152 Heath street .....	2,396.34
13 and 15 Cornish road .....	6,028.80

Total..... \$14,418.56

The total work done by the plaintiffs without regard to any sums heretofore paid them aggregates..... \$3,070.00

The total material supplied by the Canada Hardware was ..... 278.22  
and by the Wardfold ..... 463.64

making a total of work and material supplied by these three lienholders of ..... \$3,811.86

The total increased selling value has been already ascertained at \$10,093.

Now, applying, in arithmetical form, our formula, we have: \$14,418.56; \$3,811.86; \$10,093; \$2,667.90.

In other words, the contribution of the three respondent lienholders to the “increased selling value” is \$2,667.90. If there were no prior charge on the property, that is the fund on which they would be entitled to rank ratably among themselves.

But it has already been shewn that in this case, owing to the incidence of the prior claim of the first mortgagees, the fund on which these respondents are entitled to rank is reduced to \$2,254.34.

The net result is that out of the moneys in court there should be paid to the lienholders a total of \$2,254.34, and the balance of the moneys in court should be paid out to the appellant. The \$2,254.34 should be paid to the lienholders in proportion to the following sums for which each is entitled to rank:—

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App. Div.	Cameron & Stevenson .....	\$2,324.93
1926.	Canada Hardware .....	165.22
	Wardfold .....	200.00

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J.A.

The action is remitted to the Master to be dealt with in accordance with these findings.

The appellant's costs of this appeal will be paid by the lienholders, each being liable for his proportionate share only of the total costs.

LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, J.J.A., agreed in the result.

*Appeal allowed in part.*

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[APPELLATE DIVISION.]

1926.

GILLIES v. LYE.

April 1.

*Negligence—Motor Vehicles upon Highway — Collision—Lights “after Dusk” — Highway Traffic Act, 1923, 13 & 14 Geo. V. ch. 48, sec. 10—“Shall be clearly Visible”—Evidence—Responsibility for Collision—Ultimate Negligence.*

Section 10(1) of the Highway Traffic Act, 1923, providing that, when on a highway after dusk and before dawn, every motor vehicle shall carry two lighted lamps in front and one on the back of the vehicle, provides further that “any lamp so used shall be clearly visible at a distance of at least 200 feet.”—

*Held*, that these words mean that the light of the lamps shall be clearly visible 200 feet away—not that the objects illuminated by the lamps may be seen from the vehicle which carries them at a distance of 200 feet.

In a case where there was no evidence that the light of the lamps on the plaintiff's car was not clearly visible 200 feet away, and no negligence on the part of the plaintiff was shewn, it was *held*, that the defendant's driver alone was responsible for the collision which occurred between his motor vehicle and that of the plaintiff, and the doctrine of ultimate negligence could not be applied.

APPEAL by the plaintiff and cross-appeal by the defendant from the judgment of WIDDIFIELD, Jun. Co. C.J. (noted 29 O.W.N. 336), in the County Court of the County of York, upon a claim by the plaintiff and counterclaim by the defendant for damages sustained in a collision of motor vehicles upon a highway. The judgment of the County Court was for the plaintiff for the recovery of \$212.80 upon his claim and for the defendant for the recovery of \$130.96 upon his counterclaim, with a set-off *pro tanto*, and without costs to either party.

March 1 and 2. The appeal and cross-appeal were heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*T. N. Phelan*, K.C., and *E. A. Richardson*, for the plaintiff, argued that the defendant had been negligent in not exercising the degree of care required of a person attempting to turn out to pass a car ahead, and that this negligence was the proximate cause of the accident. As to the lights on the plaintiff's car, they complied with the requirements of the Highway Traffic Act, 1923. The learned Judge below misinterpreted the meaning of the Act in considering that the lighted lamps should illumine an object 200 feet ahead of the car bearing them. The statute requires rather that the lighted lamps on a car must be visible from a point 200 feet ahead of the car. No evidence had been produced to shew that the lamps on the plaintiff's car could not have been seen at that distance. Therefore the plaintiff had not been guilty of any negligence.

*I. B. Lucas*, K.C., and *G. K. Lucas*, for the defendant, contended that if the driver of his car were guilty of negligence, as found, that negligence was not the proximate cause of the accident. The plaintiff did not carry lights plainly visible at a distance of 200 feet, as required by the statute, and this negligence was the proximate cause of the accident. The defendant was led into a trap by the absence of proper lights on the plaintiff's car.

April 1. The judgment of the Court was read by RIDDELL, J.A.:—The facts are not complicated. I copy from his Honour's reasons for judgment:—

"On the evening of the 16th August, 1925, the plaintiff was driving an automobile southerly on the highway, a gravel-road. The defendant's wife was driving his car northerly on the same highway, following closely behind another car also going north.

"There was considerable motor traffic on this highway at the time, some of it caused by persons returning from church. The growing darkness and the dust on the highway made for very imperfect visibility. I think it was at least 8 p.m.—probably later—when the accident happened, that it was 'after dusk.'

"The defendant, desiring to pass the car in front of him, sounded his horn, turned out to the left and increased the speed to pass. Just at this moment, the plaintiff's car was about to pass the forward car, and before the defendant's car had got straightened out on the road the collision took place."

His Honour found as follows as to the defendant:—

"I think the driver of the defendant's car was negligent. It is

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clear that she turned out to pass the forward car without proper observation and when close behind it, at such an angle that she was prevented from seeing the plaintiff's car until it was too late to avoid a collision."

With this finding I wholly agree; and, indeed, it was but feebly contested on the appeal. The defendant, however, contends that this negligence, if it did exist, was *causa sine quâ non*, the real *causa causans* being the ultimate negligence of the plaintiff.

I can find no evidence of negligence on the part of the plaintiff subsequent, logically or temporarily, to the negligence of the defendant which has been found—and the doctrine of ultimate negligence does not apply. The plaintiff was proceeding at a proper speed south on his own side of the road when he first saw or should or could have seen the defendant's car, and then it was too late for him to avoid the accident.

His Honour, however, finds the plaintiff negligent in respect of the lights which were on the car. He says:—

"If the plaintiff's car had been properly lighted, the driver would have, or should have, seen the rays of light shed along the road, and if she had then turned out to the left she would have been wholly to blame."

Except so far as can be implied from the duty to take reasonable and proper care, there is no common law liability to light any vehicle—the duty is created by statute. Our Highway Traffic Act, 1923, prescribes lights thus:—

"10.—(1) Whenever on a highway after dusk and before dawn, every motor vehicle shall carry three lighted lamps in a conspicuous position, one on each side of the front, which shall cast a white, green or amber-coloured light only, and one on the back of the vehicle, which shall cast from its face a red light only, except in the case of a motor bicycle without a side car, which shall carry one lamp on the front which shall cast a white light only and one on the back of the vehicle which shall cast from its face a red light only. Any lamp so used shall be clearly visible at a distance of at least 200 feet.

"(2) No motor vehicle shall carry on the front thereof more than three lighted lamps of over four candle power; and additional lights displayed on the front of commercial vehicles to distinguish the width or class of such vehicle shall be green in colour only and of not more than four candle power."

In interpreting the expression "Any lamp so used shall be clearly visible at a distance of at least 200 feet," the learned County Court Judge follows a Minnesota case, *Thomas v. Stevenson*

(1920), 146 Minn. 272, 178 N.W. Repr. 1021, and holds that what is meant is not that a person 200 feet away can see the lamp, but that objects 200 feet away are so lighted by the lamp that they can be seen from the automobile. I have no concern with the accuracy of the interpretation by the Minnesota Court of the language of the Minnesota legislature; I do not know the meaning in Minnesota of the words used in the statute; it may be that the Chief Justice is wrong and the two Puisnes are right. Nor do I dispute the proposition that a statute can be so drawn as to require the light to illuminate objects 200 feet distant: *Musgrave v. Studebaker Bros. Co. of Utah* (1916), 48 Utah 410, 160 Pac. Repr. 117; *Berry on Automobiles*, 4th ed., pp. 173, 174.

But in interpreting the language of the Ontario Legislature, and applying the modern presumption that legislators know the meaning of ordinary words, and say what they mean, there can be no doubt that the language quoted means what it says, that is, that the lamp casting a light—the lighted lamp—shall be clearly visible 200 feet away. It is not the objects illuminated by the lamp that are to be clearly visible 200 feet away, but the light of the lamp.

Even were the language ambiguous—which it is not—the provisions of sec. 10(2) would shew that the interpretation adopted below is erroneous. No one could imagine that three lights of 4 candle power would illuminate clearly a road 200 feet away.

It seems rather to be the intention of the Legislature to prevent strong head-lights—a curse to proper motor travel, notoriously too common, although illegal.

Had the learned County Judge not misapprehended the law—or, to use terminology more familiar in certain other jurisdictions than in our own, had he not misdirected himself on the law—I think it is clear that he would not have found the plaintiff negligent at all.

Nor, I think, can we find negligence against him on the evidence. He had two “cowl” lights of 4 candle power at the front end of his car, and he thereby complied with the Act. It may well be that the driver of the defendant’s car failed to observe them clearly, by reason of the dust, but there is no evidence to indicate that they were not clearly visible 200 feet away.

I would allow the plaintiff’s appeal and disallow the defendant’s cross-appeal, both with costs, and direct judgment to be entered for the plaintiff for the amount indicated in the judgment, \$425.60, with costs of action and dismissing the counterclaim with costs.

*Order accordingly.*

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## [APPELLATE DIVISION.]

1926.

RE J. B. JACKSON LTD. AND GETTAS.

April 1.

*Landlord and Tenant—Overholding Tenant—Forfeiture of Lease for Breach of Covenant—Preliminary Notice—Landlord and Tenant Act, sec. 20(2)—Conduct after Notice—Whether Recognition of Lease as Still in Force—Election—Waiver—Powers of County Court Judge under Part III. of Act—Persona Designata—Relief against Forfeiture.*

In a lease of premises in a town, the tenant covenanted to purchase from the landlord (an incorporated company) all the ice-cream required for the purpose of the business to be carried on upon the premises; and that, in the event of the tenant being guilty of any breach of that covenant, the lease should be forfeited and void and the landlord might re-enter. The landlord covenanted to supply ice-cream of good quality at certain prices. There was a breach of the tenant's covenant; and the landlord, as a preliminary to re-entry or forfeiture, served upon the tenant a notice, pursuant to sec. 20(2) of the Landlord and Tenant Act, complaining of the breach, stating that the landlord had always been ready and willing to supply all demands of the tenant for ice-cream of a good quality during the currency of the lease, and requiring the tenant to remedy the breach and pay a named sum of money as compensation for the breach. Nothing was done by the tenant to remedy the breach. The landlord refused to receive rent, lest it might be taken to waive forfeiture; but, conceiving itself bound by its covenant, continued to deliver to the tenant all the ice-cream demanded. Some months after the notice, the landlord addressed a letter to the tenant setting forth the price at which it was willing to supply him with ice-cream "according to our agreement." The only agreement was the lease. Shortly afterwards, the landlord served upon the defendant a notice demanding immediate possession. This was refused, and thereupon proceedings under Part III. of the Act were taken, and an order made by a County Court Judge commanding the sheriff to put the landlord in possession of the premises, and further directing that, upon certain terms, the tenant should be relieved from the forfeiture:—

*Held, per Curiam*, that the County Court Judge, acting under Part III., was not a "court" but merely *persona designata*, and had no power to relieve from forfeiture; and that part of his order should be struck out.

*Re Bagshaw and O'Connor* (1918), 42 O.L.R. 466, followed.

And *held*, by the majority of the Court, that nothing that was done indicated any intention on the part of the landlord to elect to forgo the right of re-entry; and the order for possession should be affirmed, subject to a reservation of the right of the tenant to apply for relief to a court having jurisdiction.

Review of the authorities on waiver and election.

*Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773, specially referred to.

*Per* LATCHFORD, C.J., and RIDDELL, J.A., dissenting, that the landlord, after serving notice of forfeiture and with full knowledge, chose to regard the lease as subsisting for the purpose of compelling it to supply ice-cream to the tenant at a certain price, and thereby did that which was tantamount to waiving its right to re-entry.

AN appeal by George P. Gettas, tenant, from an order of the Judge of the County Court of the County of Norfolk commanding

the Sheriff of the county forthwith to place J. B. Jackson Ltd., the landlord, in possession of the premises demised to the appellant; and directing that, upon the appellant paying to the landlord \$488.15 compensation and the landlord's taxed costs and entering into a new lease, the appellant should be relieved against forfeiture of the lease for breach of a covenant contained therein.

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RE

J. B.

JACKSON  
LTD. AND  
GETTAS.

March 3. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*W. J. P. Jenner*, for the appellant, argued that there had been no breach of covenant by the tenant; but, if there was such a breach, the landlord had lost his right to redress by his conduct. He had, after serving notice of forfeiture, affirmed the lease, and thereby waived the forfeiture. The unequivocal acts evidencing the waiver were supplying ice-cream to the tenant during the last four months of 1925, and writing a certain letter dated the 7th December, 1925. The County Court Judge had no power to impose conditions upon the tenant which if complied with would relieve him from the forfeiture of the lease.

*G. H. Kilmer*, K.C., for the landlord, respondent, contended that his client had not waived the forfeiture. Neither of the acts relied upon by the tenant established waiver. They were both consistent with the preservation by the landlord of his right to elect for forfeiture, which he afterwards did.

April 1. LATCHFORD, C.J.:—This is an appeal under sec. 78 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, from an order made on the 27th January, 1926, by the Judge of the County Court of the County of Norfolk, pursuant to sec. 77 of the Act, commanding the Sheriff of the county forthwith to place J. B. Jackson Limited in possession of certain premises held by Gettas under a lease from the Jackson company.

The order further directs that upon the tenant paying to the landlord \$488.15 compensation, and the landlord's taxed costs, and entering into a new lease, the tenant shall be relieved against forfeiture of the lease.

The tenant appeals on the ground that the learned Judge erred (1) "in directing forfeiture by attaching certain conditions, and in directing the parties to enter into a new contract;" and (2) "that the landlord has, by unequivocal acts and by acquiescence in acting upon the lease, waived its right, if any, to forfeiture of the lease."

The landlord manufactured ice-cream, and the tenant, as part of the consideration for the granting of the term, covenanted that

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he would, throughout the term of five years, purchase from the lessor all the ice-cream used in connection with the business to be carried on upon the demised premises, or sold elsewhere by the lessee, the lessor on its part agreeing that it would supply the lessee on the demised premises with ice-cream of good quality at certain prices.

The lease provided that on breach of the covenant, the landlord should be entitled to declare the term forfeited and void.

It was found as a fact by the learned Judge that the covenant particularly referred to had been broken by the tenant; and, while the evidence on the point is not very strong, I am not prepared to say that the conclusion arrived at was not well-founded. It appears that on one occasion at least, and probably oftener, the tenant manufactured ice-cream in breach of his covenant, and sold what he so manufactured.

On the 22nd September, 1925, the landlord caused a notice to be served on the tenant complaining that, contrary to the terms of the covenant in the lease, Gettas had not purchased from it all the ice-cream used in connection with his business on the premises or sold by him elsewhere in the town of Simcoe during a certain period. The notice also required the tenant, within one month from its date, to remedy the breach of covenant so complained of, and to pay a certain sum as compensation for the breach.

The notice is given pursuant to sec. 20, subsec. 2, of the Act. It specifies the particular breach complained of, requires the lessee to make compensation in money for the breach, and, "within one calendar month from the date of the notice, to remedy the breach so complained of." How the breach could possibly be remedied is not suggested, but the propriety of the notice is not questioned, and it seems to comply with the requirements of the statute. The lessee did not apply to the Court for relief under subsec. 3 of sec. 20.

On the 7th December, the landlord addressed a letter to the tenant setting forth the prices at which it was willing to supply Gettas with ice-cream "according to our agreement." The only agreement between the parties was the lease.

A few days after the letter was written, a demand by the landlord for possession of the demised premises was served on Gettas, who refused to surrender his term. Proceedings were thereupon taken against him under Part III. of the Act, and the order now appealed from was made.

So far as the order imposes on the tenant conditions which if complied with relieve him against the forfeiture, I cannot but think that his Honour exceeded any power conferred upon him by

the Act, and he had no other power. However, that phase of the order is not important. The material point for decision is whether the learned Judge was right in considering that the letter of the 7th December was not a waiver of the forfeiture.

The letter was signed on behalf of the landlord by its president, W. G. Jackson, who had knowledge of the facts under which the right of entry is claimed to have accrued. What was particularly desired in the interest of his company was that Gettas should not manufacture ice-cream, but should continue to purchase it from his landlord—and not, if that were done, that the lease should be at an end.

This clearly appears from Jackson's evidence.

The following is from his cross-examination:—

"103. Q. The company served notice in September immediately after the breach in 1925. You claim a breach of the covenant? A. Yes.

"104. Q. That is in January, 1926. From time to time you have been claiming the right to enforce your agreement against him in connection with the ice-cream since you served that notice? A. Yes.

"105. Q. You are acting under the lease. After you served the notice you dealt with him in cream? A. I don't follow.

"106. You understood that the lease was in force against him. You should have been dealing with him? A. Yes.

"107. Q. Insisting on that, you can't claim that the lease is forfeited and at the same time in force. You have been selling under that lease? A. Yes."

Following an adjournment, Mr. Kelly called the attention of the witness to the letter:—

"In that letter you say: 'We charge 10 per cent. less for bulk and 1 per cent. (1c?) less for bricks; we take this opportunity of pointing out that this price is \$1.26 beginning to-day, December the 7th, 1925. That is 19c for bricks.' At the time of writing that letter you were insisting on the rights you had with Gettas under the lease? A. Yes."

On re-examination:—

"64. Q. As to the question Mr. Kelly raised about selling ice-cream subsequent to September, he says you raised the price. Tell us why? A. When Gettas claimed his 10 per cent. less than the regular price and 1 per cent. on the bricks, we considered that that price should be raised and that he should pay the price agreed on in the lease."

"76. Q. Mr. Kelly speaks of you insisting on the rights under the lease in his cross-examination. That is another question. How

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1926. lease? A. I don't understand you.  
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J. B. '77. Q. Mr. Kelly stated you were insisting on the rights  
JACKSON under the lease as regards the price. I want to ask you if you are  
LTD. AND also insisting on the rights the lease gave you for selling ice-  
GETTAS. cream? A. We would be satisfied with that. We are only insist-  
ing on what is reasonable. If there is any way of carrying on  
Latchford, under the lease and not have the cream sold."

C.J.

His Honour:—

"78. Q. Under Mr. Kelly's question under the terms of this letter and the price charged for cream delivered since the breach and during the time of being broken, the Jackson company have been carrying out the terms of the lease as far as the charges are concerned? A. Yes, the price is in accordance with the lease."

Thus, after notice given by him of forfeiture, the landlord was affirming a term of the lease. This, in my opinion, is a waiver of the forfeiture.

What constitutes a waiver is discussed in many cases. The onus of establishing it rests, of course, on the tenant. The levying of a distress or the acceptance of rent is usually the act which, coupled with knowledge of the facts upon which his right to re-enter arises, is ordinarily held to amount to a waiver by the landlord.

The principle applied may be thus stated: If the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act which recognises the continued existence of the lease, then, and only then, will he be considered to have waived that right: Woodfall on Landlord and Tenant, 20th ed., p. 394, and the cases there cited, especially the discussion of the question by Parker, J., in *Matthew v. Smallwood*, [1910] 1 Ch. 777, at p. 786.

The landlord of Gettas, after serving notice of forfeiture and with full knowledge, chose to regard the lease as subsisting for one purpose, that is, to compel it to supply ice-cream to the tenant at a certain price, and thereby, in my opinion, did that which was tantamount to waiving its right to re-entry.

I think the appeal should be allowed with costs here and below.

RIDDELL, J.A., agreed with LATCHFORD, C.J.

MIDDLETON, J.A.:—The facts of this case are set forth at some length in the judgment of my Lord the Chief Justice, but I find myself in disagreement with the conclusion at which he has arrived.

The landlord, a manufacturer of ice-cream, in entering into the lease of the premises, an ice-cream parlor, stipulated as a term of

the lease that the tenant should purchase from him all the ice-cream required for the purpose of the business to be carried on upon the demised premises. For the landlord's protection it was provided that in the event of the lessee being guilty of any breach of his agreement to purchase all the ice-cream used in connection with the business, or sold elsewhere by the lessee in the town of Simcoe, the lease should be forfeited and void and the landlord might re-enter.

The landlord, on its part, agreed to supply ice-cream of a good quality at \$1.20 per gallon until the 10th March, 1925, and after that date at 10 per cent. below the regular market price, and to refrain from retailing ice-cream in the town of Simcoe, except at its place of business in Union street.

The learned County Court Judge has held that the lessee has been guilty of a breach of this covenant, and a perusal of the evidence leads me to think that this finding was warranted. By this I mean that not merely was there a breach on the one occasion so much discussed in the evidence, but also that there was a systematic and intentional violation of the tenant's obligations.

The whole difficulty arises from the requirements of sec. 20(2) of the Landlord and Tenant Act, which provides that a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease shall not be enforceable unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach. If upon such notice being given, the lessee fails, within a reasonable time, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach, the landlord may exercise his right of re-entry and forfeiture.

This provision is easily applicable in cases of non-repair or similar breaches of covenant on the part of the tenant, but it is exceedingly difficult to apply in a case such as the present, where the lease contains mutual obligations on the part of the landlord and the tenant. This was, no doubt, felt by the landlord in preparing the notice which was given. I need not quote it at length.

The notice states that the landlord complains of the tenant, to whom the notice is addressed, not having purchased all the ice-cream used in connection with his business or sold elsewhere in the town of Simcoe from the landlord in and during the months from May to August, and the first two weeks of September, contrary to the terms of the covenant in the lease, which was therein

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quoted at length. The notice then states that the landlord "has always been ready and willing to supply all demands of you, the said George P. Gettas, for ice-cream of a good quality during the currency of the said lease." The notice then requires the tenant to remedy the breach of covenant complained of, and to pay \$488.15 compensation in money for the breach of the agreement. This amount named is arrived at by the landlord as representing the difference in his profits upon the ice-cream used during these named months and that used during the corresponding months of the preceding year.

Nothing was done by the tenant to remedy his default, but the landlord refused to receive rent, stating to the tenant that by so doing he might and probably would be taken to waive forfeiture of the lease; but the landlord, conceiving itself bound by its covenant to supply the tenant with ice-cream, continued to deliver all that was asked for until, at any rate, these proceedings were commenced.

Some difficulty arose between the landlord and tenant as to the adjustment of the accounts for ice-cream supplied; and, with a view of making his position perfectly plain, the landlord wrote a letter on the 7th December, setting forth the price which he claimed to be entitled to charge, under the terms of the agreement. Almost contemporaneously with the writing of this letter, the notice of the 8th December was served upon the tenant demanding immediate possession of the premises. This demand was met with a flat refusal. Thereupon these proceedings under the overholding tenants provisions of the Landlord and Tenant Act were commenced, with the result outlined by my Lord. An appeal is now had, upon the ground that the "landlord has, by unequivocal acts and by acquiescence in acting upon the lease, waived its rights, if any, to forfeiture of the lease."

The acts referred to are the selling of ice-cream to the tenant as and when demanded by him, and the writing of the letter of the 7th December stating the price demanded for ice-cream, and incidentally referring to "our agreement." The use of the words "our agreement" does not appear to me to be fatal to the landlord's position. I do not think that there is anything in it to indicate that the tenancy was yet current and existing. I am inclined to think that it is nothing more than a reference to the agreement once made and embodied in a written document, and that the principle of *Batchelor v. Murphy*, [1925] 1 Ch. 220, is applicable. I refer particularly to what is said by Lord Justice Warrington, at p. 229. There had been a reference to a "lease." The Lord Justice says: "The word 'lease,' if you get it by itself, may mean one of two things. It may mean, and in some cases



has been held to mean, the relation of landlord and tenant or a mere contract of tenancy. On the other hand, it may mean and properly may mean the document by which that relation is created."

Further, I think that one has to look at the circumstances. The lease and the agreement embodied in it were not absolutely at an end. The statute had prevented the landlord from asserting his rights until an opportunity had been given to the tenant to remedy his default and pay damages, and the tenant had, under the statute, a reasonable time to remedy his breach; and, furthermore, the tenant had the right conferred by subsec. 3 to apply to the Court to relieve him from the consequences of his breach, upon such terms as the Court might deem just.

Looked at fairly, all that the landlord was doing either in supplying the ice-cream as he did and in writing the letter that he did, with reference to the price, was to make it plain that he was not in default, and was ready on his part to carry out the bargain originally entered into. His hope and desire were that the tenant would avail himself of the privileges conferred upon him by the statute, and that the tenant might continue to purchase the ice-cream he had to sell, and the landlord's intention was to guard himself from any default which, under the terms of the lease, would enable the tenant to purchase elsewhere. I cannot read into it any intention whatever to forgo the right of forfeiture if the tenant persisted in his refusal to remedy the breach.

I dissent from what was said in the course of the argument as to "waiver of the forfeiture." It proceeded upon a misunderstanding of the law. Under the lease, upon the breach by the tenant, the landlord was given the right, if he elected so to do, to terminate the lease. It was necessary that he should indicate his election to terminate the lease in some way. Having once elected, the lease would then be at an end, and could not be revived except by the mutual consent of both parties.

There cannot, in any proper sense of the term, be such a thing as a "waiver of a forfeiture." The landlord may, if he sees fit, elect not to avail himself of the right given him by the contract and the tenant's conduct, but this, I think, must be by some unambiguous action.

In the case of *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773, dealing with the right of rescission, there is much in the judgment of Lord Atkinson throwing light upon the question under discussion. He first points out, at p. 781, that, where there is a right to rescind, "if the other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for

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himself by his election, and the latter gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract."

At p. 787 he quotes from an earlier decision shewing that the right to rescind will be lost where the party having the right to rescission, "either by express words or by unequivocal acts, affirmed the contract." When this is done "their election has been determined forever." "We think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. . . . If by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture."

Further on (pp. 787, 788), the Lord Justice uses this language: "Turning for a moment to these analogous cases of the so-called waiver by the lessor of the forfeiture of a lease, one finds that the governing factor is the intention of the party purporting to waive it. . . . Mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of a forfeiture. It is only evidence of the election of the lessor to retain the reversion and its incidents instead of taking possession of the land."

Lord Mansfield was then quoted as saying: "The question therefore is *quo animo* the rent was received, and what the real intention of both parties was?" This is guarded by pointing out "that the landlord cannot do an act lawful only if he had a particular intention and yet say that he had it not."

Applying all this to the case in hand, I fail to find anything that indicates any intention or anything from which an intention could properly be found on the part of the landlord to forgo the right of entry which the tenant's default gave to it. Its attitude throughout is perfectly consistent. When it gave the notice which it was compelled to give by the term of the statute, it accompanied it by the expression of a readiness to live up to its part of the bargain, and in the end when, on the 7th and 8th December, it wrote the letter and served the notice, it did nothing more than reiterate its readiness to carry out the contract originally made. Everything points most strongly to the adherence on its part to the intention to terminate the lease if the tenant would not exercise his statutory right of remedying the breach.

I quite agree that it is not open to one having a right exercisable at his option to blow hot and blow cold.

Subject to qualifications not now material, it is true as it was in Comyn's day, "if a man once determines his election, it shall be determined forever." I also agree that one having the right to elect may so conduct himself that he is estopped from exercising the right, but there is nothing of that kind here. There was nothing done by the landlord at any time causing the tenant to change his position.

The learned County Court Judge has assumed that the right to relieve from forfeiture is a right which has been conferred upon him. Under the statute as it now stands, the Court can alone grant relief. The County Court Judge, acting under Part III., is not a "court" but a mere *persona designata*. This is made plain by the decision of the Divisional Court in *Re Bagshaw and O'Connor* (1918), 42 O.L.R. 466.

The provisions in the order relieving from forfeiture should be struck out. If the landlord is willing to extend grace to the tenant, he may do so, and this order may reserve the right, if any, of the tenant to make application to a court having jurisdiction for relief under the statutory provisions referred to.

With this variation, the order appealed from should be affirmed, and the tenant should pay the landlord's costs.

MASTEN, J.A.:—The nature of the present appeal and the leading facts are recited in the reasons for judgment prepared by my Lord and by my brother Middleton and need not be here repeated. We all agree that we ought not to interfere with the finding of the trial Judge that the tenant committed a breach of his covenant requiring him to purchase his entire supply of ice-cream from the landlord.

In consequence the landlord acquired a right to re-enter and to forfeit the lease, subject however to the limitation prescribed by sec. 20 of the Landlord and Tenant Act. This right arose or at least came to the knowledge of the landlord on or about the 7th September, 1925. For want of a better term, the landlord's right on the 7th September may be described as an "inchoate right," for he could not put an end to the lease unless or until he had served on the lessee a notice specifying the particular breach complained of, and, if the breach be capable of remedy, requiring the lessee to remedy the breach and to make compensation in money for the breach. Thereupon, if the tenant complies with the requirements specified in the notice, the landlord's inchoate right of re-entry is defeated, and the lease remains in

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But, while the landlord could not summarily, on the 7th September, cancel the lease and eject his tenant, there was nothing to prevent him at any time after the 7th September from making his election not to avoid the lease or in other words to waive the forfeiture. The question is, did the landlord make such election by supplying ice-cream to the tenant, pursuant to his covenant in the lease, from the 7th September, throughout the months of September, October, November, and December, and by writing and delivering the following letter:—

“ J. B. Jackson Limited,  
 Cold Storage,  
 Butter, eggs, cheese,  
 ice-cream.

Simcoe, Dec. 7, 1925.

“ Mr. Geo. Gettas, Simcoe, Ont.

“ Dear Sir: For the past two summer seasons the regular price of ice-cream delivered in Simcoe with packing service has been \$1.40 per gallon for bulk and 20c. for bricks. Under our agreement with you we are to charge you 10 per cent. less for bulk and one cent less for bricks. This makes your price \$1.26 per ga. for bulk and 19c. for bricks. Commencing to-day, therefore, we will charge you \$1.26 for bulk and 19c. for bricks. We take this opportunity of pointing out that our regular price of \$1.40 for ice-cream delivered in Simcoe with icing service is well in line with the price of the other manufacturers throughout the country. For instance, in Brantford, I understand, the price is \$1.52 per ga. for similar service.

“ Yours truly,

“ W. G. Jackson,

“ J. B. Jackson Ltd.”

Questions of election and waiver have engaged the attention of our courts and formed the subject of reported cases from the time of *Green's Case* in 1582, Cro. Eliz. 3, and probably from a much earlier date. A reference to some of the points of law which have been determined may help to limit that which we have to decide on this appeal:—

(1) Generally speaking, when a forfeiture has been incurred for breach of covenant or condition the lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease and *the lease is avoided from that time only*: Cole on Ejectment, pp. 408 and 409, and cases there cited. See also the observations of Lord Hatherley in *Reese River Silver Mining Co. v. Smith* (1869), L.R. 4 H.L. 64, at pp. 73 and 74, applied by

Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773, at p. 782.

(2) The lessor may, as he is entitled to do, keep the reversion, instead of insisting on the forfeiture and determination of the lease. What is called a waiver is not so properly a forgiveness or a condonation or release of a breach of covenant, as an election to take one estate instead of another: *per* Crompton, J., in *Croft v. Lumley* (1858), 6 H.L.C. 672, at p. 713.

In strictness, therefore, the question in such cases is, has the lessor elected not to avoid the lease? Or has he elected to avoid it? Or has he made no election? *Ibid.*, *per* Bramwell, B., at p. 705.

(3) As a general rule the question of election is to be dealt with as a question of fact: *Croft v. Lumley*, 6 H.L.C. at pp. 705 and 713; *Scarfe v. Jardine* (1882), 7 App. Cas. 345, 360; *Doe v. Batten* (1775), 1 Cowp. 243. Election, if to be gathered from action, must be gathered from unequivocal acts: *per* Lord Dunedin in the *Abram* case, [1923] A.C. at p. 779. An unequivocal act is an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way: *per* Lord Blackburn in *Scarfe v. Jardine*, 7 App. Cas. at p. 361.

(4) In cases of so-called waiver by the lessor of the forfeiture of a lease, one finds that the governing factor is the intention of the party purporting to waive it: *per* Lord Atkinson in the *Abram* case, [1923] A.C. at p. 787.

(5) If a man once determines his election it shall be determined forever, and no subsequent act, whether receipt of rent, distress, or any other act, will operate as a waiver: *Doe d. Morecraft v. Meux* (1824), 1 C. & P. 346; *Grimwood v. Moss* (1872), L.R. 7 C.P. 360; *Law v. Law*, [1905] 1 Ch. 140, at p. 158. See also 1 Sm. L.C., 12th ed., p. 48.

Keeping in view these simple and well settled principles, this appeal seems to me to present no special difficulties. Remembering that the onus is on the tenant to prove an election *not to avoid*, and that the acts of the lessor relied on by the tenant to evidence such election must be unequivocal, it is necessary merely to balance the acts evidencing an election to avoid the lease against the acts evidencing an election not to avoid the lease.

Now, as evidencing an election to avoid the lease, we have the refusal of the lessor to receive rent lest it waive the forfeiture; the service of the notice of the 22nd September, 1925, claiming that a breach of covenant had occurred and requiring compensation; next we have the demand for possession dated the 8th December, 1925, and served on the 9th December; and, lastly, the present proceeding to eject instituted on the 29th December, 1925. If, as

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stated by Lord Atkinson in the *Abram* case, the governing factor is the intention of the party purporting to waive the forfeiture, these facts (which are not in dispute) establish a very strong case for an election to forfeit.

Opposing this view and in answer to it, we have the supply of ice-cream by the landlord to the tenant from the 7th September, throughout the months of September, October, November, and December, and the letter of the 7th December which I have quoted. It is unnecessary to discuss the question whether the landlord's covenant respecting ice-cream is a dependent or an independent and collateral covenant, for down to the 9th December, 1925, when the demand of possession was served, the lease certainly remained in full force for all purposes, because up till that date the landlord had not declared any election to waive or not to waive the forfeiture. It may be that no such final election took place until the 30th December, when the notice of appointment in the overholding tenancy proceedings was served, but the point is not material and I express no opinion upon it.

As the lease remained in full force, it is obvious that during its currency the landlord's obligation to supply ice-cream on the terms prescribed by the lease continued unimpaired. Hence the supply of ice-cream down to the 9th December was obligatory, and the letter of the 7th December, 1925, was a mere recognition of an existing legal obligation, but was not and could not be a waiver of the right thereafter to elect for forfeiture, which right the landlord was manifestly seeking to preserve. Neither the supply of ice-cream by the landlord, nor the letter of the 7th December declaring its willingness to do what the agreement then existing called for, is inconsistent with the preservation by the landlord of its right to elect for forfeiture, nor are they unequivocal acts, that is, acts which would be justifiable if the landlord elected to waive the forfeiture, but would not be justifiable if it had elected the other way. It was at liberty to offer to supply and to supply ice-cream on the terms of the lease or on any other terms it chose to offer. It did not need the assistance of the lease to give it any rights in that regard. The landlord's right to elect for or against the forfeiture remained, I think, unimpaired until it was exercised either on the 9th December or on the 30th December.

When the landlord elected to avoid the lease and communicated his election to the tenant the lease was determined forever. Any subsequent sale of ice-cream by the landlord to the tenant, could not give life to the dead lease.

For these reasons, I agree with the order proposed by my brother Middleton.

ORDE, J.A.:—The question whether or not the landlord company waived its right of re-entry because of the tenant's forfeiture by reason of his breach of covenant, is, I think, easily answered if we keep in mind the precise relationship of the parties after notice of the breach had been given.

By sec. 20, subsec. 2, of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, the landlord's right of re-entry for breach of the covenant in question was not enforceable until after due notice of the breach and failure to remedy it, if capable of remedy, and to make compensation.

The notice so given is not an election to exercise the right of forfeiture, but a preliminary statutory requirement for its exercise. If the tenant complies with the notice, the ground for forfeiture disappears, and with it any right of re-entry.

The tenant having failed to comply with the requirements of the notice, the landlord's right of re-entry then became enforceable, and it was not until then that he was free to elect whether to exercise it or not. Had he decided to take no further steps, it could not be argued for a moment that the estate demised to the tenant had been determined or even suspended while the notice was running. How, then, can it be said, when the landlord elects to enforce his right, that the forfeiture operates so as to determine the tenancy as of the date of the breach of covenant or of notice thereof? That the estate still subsists is clear from the cases cited by my brothers Middleton and Masten, and also from that of *Dendy v. Evans*, [1909] 2 K.B. 894, [1910] 1 K.B. 263. In that case relief against forfeiture for breach of covenant had been granted by the Court. There had been an underlease, and, after the relief had been granted, the original lessee assigned the residue of the unexpired term to the wife of the lessor, who then sued the underlessee for certain arrears of rent due under the underlease. The underlessee resisted payment, urging that the election to enforce the right of re-entry under the original lease had avoided that lease, and consequently the underlease with it. But it was held at the trial and upon appeal that, as the action taken to enforce the right of re-entry had never ripened into a judgment, but on the contrary the forfeiture had been relieved against, the original lease had never come to an end at all, but was still subsisting, and that the effect of the judgment relieving against the forfeiture was not "merely to resuscitate" the old lease and grant a new one. "The forfeiture had been absolutely and entirely got rid of."

If, therefore, the relationship of landlord and tenant still continued and the estate of the tenant still subsisted, was the land-

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lord not still bound by the terms of the lease? How could it safely have refused to supply ice-cream to the tenant upon these terms, while the notice calling upon the tenant to make good his default was still running? The landlord could not interfere with the tenant's quiet enjoyment of the demised premises, and he was surely as fully bound to observe every other covenant which the lease required him to perform.

Then how could his fulfilment of this obligation be interpreted as in any way waiving the forfeiture? Even the reference to the terms of the "agreement" in the letter of the 7th December, 1925, in no way compromised the landlord, whether by the "agreement" was meant the mere document or the very terms of the lease itself.

I agree that the appeal should be dismissed, with the variation in the order below suggested by my brother Middleton.

*Order affirmed, subject to a variation (LATCHFORD, C.J., and  
RIDDELL, J.A., dissenting).*

## [APPELLATE DIVISION.]

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Dec. 18.

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April 1.

*Contract—Purchase of Shares of Company's Stock—Vendor's Guaranty of "a Dividend" and Promise to Pay Named Price for Shares at End of Certain Period—Construction of Contract—Consideration—Statute of Frauds, R.S.O. 1914, ch. 102, secs. 5 and 6.*

The plaintiff, having purchased from the defendant 20 shares of the stock of a company, became dissatisfied and told the defendant that he was going to sue him, on the ground of misrepresentation, for the sum he had paid and for rescission. The defendant said that the company was in a strong financial position and was at the moment issuing a 7 per cent. dividend to the stockholders, and that he would guarantee both the dividend and the stock. He then prepared and signed a document in the following words: "Pursuant to our conversation, I hereby advise you that I will personally guarantee a 7 per cent. dividend on the preferred stock of" the company "which you hold and will further agree that at the end of 5 years of the date hereon I will pay you \$100 a share for the 200 shares of preferred stock which you now hold:"—

*Held*, that this was not a guaranty to which sec. 6 of the Statute of Frauds, R.S.O. 1914, ch. 102, applied.

The first agreement was that "a 7 per cent. dividend" would be paid. That meant a 7 per cent. dividend for one year (RIDDELL, J., *dubitante*).

There was no evidence that the plaintiff agreed to sell his stock to the defendant at the end of 5 years; and there was nothing making it certain that the plaintiff would not dispose of it before the end of a year; and, as only contracts which are incapable of being performed within the year come within the statute, the statute, sec. 5, did not apply; and, consideration being proved *aliunde*, there was nothing in the way of the plaintiff's recovering the amount of a 7 per cent. dividend.



The second promise, to pay \$100 a share at the end of 5 years, was not in itself a contract without acceptance; but in the instrument a sufficient consideration appeared, viz., the stock, and by bringing this action the plaintiff sufficiently accepted the defendant's offer, and was entitled to recover what he paid for the stock, the action having been brought after the expiry of 5 years from the date of the instrument.

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ACTION for damages for breach of a contract.

The action was tried by LOGIE, J., without a jury, at Hamilton.  
*C. W. Bell*, K.C., for the plaintiff.

*W. S. Brewster*, K.C., for the defendant.

December 18, 1925. LOGIE, J.:—The plaintiff is a farmer who, on the 4th December, 1919, agreed to purchase from the defendant, through an agent named Johnston, 20 shares of Monarch Tractors Ltd., redeemable by the company at the end of five years at a premium, under the following agreement:—

“Issue of 100,000 of Preferred Treasury Stock of  
“Monarch Tractors Limited.

“Factories:

No. 1307.

“Brantford, Can.

“C. E. Brown, Brantford, Ont.

“All cheques and payments to be made payable to the company.”

“I hereby purchase 20 seven per cent. (7%) preferred, accumulative, and participating shares of the capital stock of Monarch Tractors Limited, fully paid and non-assessable, par value \$100 per share. I agree to pay for the said stock the sum of \$2,000, \$400 in 30 days, \$1,600 in 90 days.

“Certificate to be issued when consideration paid in full. I hereby acknowledge receipt of a copy of the prospectus of the above company and an exact carbon copy of this agreement of purchase of said shares.

“Dated at Hannon this 4th day of December, 1919.

“Name of subscriber in full: Samuel W. Quance.”

The \$400 above named was paid within 30 days and a note was given dated the 4th December, 1919, to the defendant personally for the balance, \$1,600.

Immediately afterwards the plaintiff became dissatisfied, and on or about the 27th February, 1920, before the expiry of the 90 days mentioned in the note, he went to Brantford and there saw the defendant. The plaintiff told him he was going to sue him, on the ground of misrepresentation, for the \$400 which he had paid, and for rescission. Brown inquired in what way the misrepresentation had taken place, and the plaintiff told him. Brown then said that the company was in a strong financial position and was at that moment issuing a 7 per cent. dividend to the stockholders of



Logie, J. record, and that the plaintiff need not be "scared." He said he  
1925. would guarantee both the dividend and the stock. The plaintiff  
QUANCE asked if it would be in writing, and the defendant answered in the  
v. affirmative. The defendant then called in his stenographer and  
BROWN. dictated the following:—

"February 27, 1920.

"Mr. Samuel W. Quance,

"R.R. No. 1,

"Hannon, Ont.

"Dear Sir:—

"Pursuant to our conversation, I herewith advise you that I will personally guarantee a 7 per cent. dividend on the preferred stock of Monarch Tractors Limited which you hold, and will further agree that at the end of five years of the date hereon I will pay you \$100 a share for the 20 shares of preferred stock which you now hold.

"Yours very truly,

"C. E. Brown."

This was signed by the defendant and handed to the plaintiff.

No cash dividend was ever paid nor was the plaintiff's stock redeemed. The company is now bankrupt.

At the expiration of the five years from the 27th February, 1920, this action was commenced.

On the pleadings the defence was a denial of the undertaking or guaranty and an allegation that if the undertaking or guaranty was given there was no consideration for the same.

Although the pleadings have never been amended, it was stated by counsel for the defendant that he had been allowed by the Master to amend by pleading R.S.O. 1914, ch. 102, sec. 5, the Statute of Frauds.

At the trial he offered no evidence, but contended that he was not liable because the document in question was not a special promise to answer for the debt, default, or miscarriage of another person, but was an agreement not to be performed within the space of one year from the making thereof, and, the consideration not being stated on the face of the document, the defendant was not liable.

He argued that it could not be a guaranty because the dividends were not a debt of the company until they were declared, and, none having been declared, there was no debt, nor by similar reasoning any default of the company in the payment of these dividends, nor any other breach of duty which might come under the heading of default, nor could the omission to pay dividends be a miscarriage, and further that the promise to pay the prin-

capital sum could not be a promise to answer for the debt, default or miscarriage of another person, because the capital sum subscribed for by the plaintiff was not a debt, and there could be no default in its non-payment by the company.

That there was consideration for the guaranty (forbearance to sue) was admitted, and if the case depended upon that consideration appearing in express terms or by reasonable inference from the perusal of the document itself, it must be confessed that upon the cases the plaintiff could not succeed.

The result of the cases is that if there is a good consideration it is not necessary that it should appear in express terms. It will be sufficient in any case if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given. Nor in my opinion is it possible in a case under the statute to import consideration by explaining the imperfect reference in the memorandum "pursuant to our conversation," by parol evidence. So that, unless the document is a guaranty, the plaintiff must fail—certainly as to part and possibly as to the whole: *Wood v. Benson* (1831), 2 Cr. & J. 94.

But I am of opinion that the whole document is a guaranty. If the promise is substantially dependent upon the third person's default, it is within the statute: *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778; and the fact that the promise is absolute and not conditional does not take the case out of the statute: *Beattie v. Dinnick* (1896), 27 O.R. 285; *Morin v. Hammond Lumber Co.*, [1923] S.C.R. 140; *Doyle v. McKinnon* (1924-5), 56 O.L.R. 298, 57 O.L.R. 104; and a guaranty is a question of fact: *Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17. Here the things guaranteed were, first, the payment of a 7 per cent. dividend on the stock subscribed and paid for, and, secondly, the redemption of the principal of the stock at the expiration of five years; and the default was the future loss which might be incurred by the omission of the third party, namely, the Monarch Tractors Ltd., to pay those dividends and to redeem the stock in question: De Colyar on Guarantees, 3rd ed., p. 61; Agnew on the Statute of Frauds, pp. 85, 86; Halsbury's Laws of England, vol. 15, p. 455.

The modern vendor and purchaser cases which consider the meaning of the word "default" as applied to a purchaser are of assistance in considering the statute: *In re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648; *In re Young & Harston's Contract* (1885), 31 Ch.D. 168.

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Being a guaranty, and there being good consideration, sec. 6\* of the Act exempts parties from stating the consideration upon the face of the document.

I am of opinion, therefore, that the plaintiff should succeed.

The defendant appealed from the judgment of LOGIE, J.

March 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*W. S. Brewster*, K.C., for the appellant, argued that Logie, J., had erred in holding that the document sued upon was a guaranty in law sufficient to render the appellant liable. There was no doubt of the company to be guaranteed. The document was rather evidence of a contract not to be performed within a year, and therefore came within the provisions of the Statute of Frauds. Parol evidence of the consideration in such a contract could not be given; the consideration must appear on the face of the document: *Halsbury's Laws of England*, vol. 7, p. 374; *Wain v. Warlters* (1804), 5 East 10. The consideration was the forbearance to sue, and this did not appear in the document.

*H. S. White*, K.C., for the plaintiff, respondent, contended that parol evidence of consideration could be given: *Chitty on Contracts*, 17th ed., p. 91; *Smith v. Neale* (1857), 2 C.B.N.S. 67; *Reuss v. Picksley* (1866), L.R. 1 Ex. 342. But the consideration, namely the stock, did appear on the face of the instrument. As to the dividends, at least the first dividend would be earned within a year, and so the statute would not apply to that one. The statute might prevent recovery on the others.

\* Sections 5 and 6 of the Statute of Frauds, R.S.O. 1914, ch. 102, are as follows:—

5. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorised.

6. No special promise made by any person to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action or other proceeding to charge the person by whom the promise was made by reason only that the consideration for the promise does not appear in writing, or by necessary inference from a written document.

April 1. RIDDELL, J.A.:—The facts of this case are sufficiently set out in the judgment of Mr. Justice Logie.

The learned Judge gave judgment for the plaintiff; the defendant, not disputing the facts, appeals, relying upon the Statute of Frauds. A more disreputable and dishonest defence I have never seen, in more than 40 years' experience; but even such a defendant is entitled to the law.

It is argued that this is not a guaranty to which the Statute of Frauds, R.S.O. 1914, ch. 102, sec. 6, applies—and I agree—it is not a special promise to answer for the debt, default, or mis-carriage of another. In the stock certificate produced before us there was no undertaking to pay any dividend—consequently there was no debt of the company to be guaranteed. And the promise to buy the stock of course is not a guaranty.

Then it is said that there is an "agreement that is not to be performed within the space of one year from the making thereof," and consequently the statute applies. It will be well to divide the agreement into its integral parts. The defendant says:—

(1) "I will personally guarantee a 7 per cent. dividend on the preferred stock of Monarch Tractors Ltd. which you hold;"

(2) "And" I "will further agree that at the end of 5 years of the date hereon, I will pay you \$100 a share for the 20 shares of preferred stock which you now own."

These are two wholly different promises, and should, I think be considered separately.

(1) It is argued that parol evidence of the consideration cannot be given in a contract under the Statute of Frauds—and I agree that the law is well settled in that sense. It is also argued that a contract under the Statute of Frauds must contain a statement of the consideration; that is also well settled: *Wain v. Warlters*, 5 East 10; *Birkmyr v. Darnell* (1704), 1 Salk. 27. The question is, does this contract come within the statute as not to be performed within the year?

The agreement is that "a 7 per cent. dividend" will be paid. This may mean one single dividend or more—but it cannot mean that the plaintiff is to receive a dividend except when and so long as he remains a shareholder.

It was rightly argued that there is no evidence that the plaintiff agreed to sell his stock to the defendant at the end of 5 years; consequently there is nothing making it certain that the plaintiff will not dispose of it before the end of a year—or that more than one dividend will become payable to him.

It is only contracts which are incapable of being performed within the year which come within the statute: *Peter v. Comp-*

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*ton* (1694), Skinn. 353, 1 Sim. L.C., 12th ed., p. 353. Those which may possibly be performed within the year are not within it: *Fenton v. Emblers* (1762), 3 Burr. 1278; *Ridley v. Ridley* (1865), 34 L.J. Ch. 462; *Wells v. Horton* (1826), 4 Bing. 40; *McGregor v. McGregor* (1888), 21 Q.B.D. 424.

This is not such an exceptional case as *Birch v. Earl of Liverpool* (1829), 9 B. & C. 392, or *Dobson v. Collis* (1856), 1 H. & N. 81, followed in *Hanau v. Ehrlich*, [1912] A.C. 39, there being no express provision that the dividend is to continue for 5 years.

Whether the contract is for one dividend or for a dividend so long as the plaintiff owns the stock—and I was inclined to the opinion that it is the latter—I think the statute does not apply.

Consequently it is admissible to prove consideration *aliunde*; that has been done; and this contract should stand.

The majority of my learned brethren are of opinion that the contract is for one dividend only, and I am not sufficiently confident in the other interpretation to dissent from their view.

(2) Wholly different considerations may apply to the second promise. It cannot be contended that this document in itself made a contract without acceptance, or that it was any more than a privilege offered to the plaintiff to dispose of his shares to the defendant if he saw fit. The defendant did not and could not contend that he had the right to take the shares *in invitum* the plaintiff. There is nothing to shew that the plaintiff, at any time before action brought, ever accepted the offer of the defendant to relieve him of his shares. But, so far as this branch of the case is concerned, it seems to me immaterial whether he did or not, although it might have influence in the other branch.

If an acceptance was not made so as to bring the agreement within the statute, *cadit questio*; if it was, then no evidence can be given by parol of any consideration dehors the instrument itself. "Parol evidence is . . . not (admissible) to make that appear to be a consideration which upon the face of the " instrument "appears not to be so:" 1 Sm. L.C., p. 343.

In this instrument a consideration and a sufficient consideration appears, namely, the stock, and no other consideration need or can be shewn. By bringing this action the plaintiff sufficiently accepted the defendant's offer.

I think the appeal must be dismissed with costs except that the recovery should be limited to \$2,000 and a 7 per cent. dividend for one year—\$140—and interest on these sums.

MIDDLETON, J.A.:—I think the recovery in this case should be limited to \$2,000 and a 7 per cent. dividend for one year, \$140,

and interest on these sums and costs, including the costs of this appeal.

LATCHFORD, C.J., and MASTEN and ORDE, J.J.A., agreed with MIDDLETON, J.A.

*Appeal dismissed with costs, subject to the variation stated.*

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[APPELLATE DIVISION.]

RE SHIPWAY IRON BELL AND WIRE MANUFACTURING CO. LTD.

1926.

*Company — Petition by Shareholder for Winding-up Order — Ontario Companies Act, sec. 187(c)—“Just and Equitable”—Insolvency of Company Appearing on Hearing of Appeal—Order not in Interest of Shareholders or Creditors—Deadlock—Domestic Quarrel.*

April 1.

An order was made by a Judge, upon the petition of a shareholder, for the winding-up of an industrial company, under the “just and equitable” clause, sec. 187(c), of the Ontario Companies Act, R.S.O. 1914, ch. 178. Upon an appeal, by the company and some of the shareholders and creditors from the order, coming on for hearing, it appeared that the interim liquidator appointed by order of the Court had made a report which shewed that the company was insolvent:—*Held*, that, as it now appeared that the order was not in the interest of any one concerned, even the petitioner, and as some of the largest creditors considered that it would be better that the company should continue its operations, the order should be set aside.

*In re Professional Commercial and Industrial Benefit Building Society (1871)*, L.R. 6 Ch. 856, followed.

*Semble*, that a company may be wound up where there is a complete deadlock in its management; but where a substantial majority of the shareholders are opposed to the making of the order, where the petition is the outcome of a mere domestic quarrel, and where no substantial advantage will accrue to the petitioner from the granting of the order, an order will not be made.

*In re Yenidje Tobacco Co.*, [1916] 2 Ch. 426, and *Re Timbers Ltd.* (1917), 35 D.L.R. 431, distinguished.

AN appeal by the company and certain shareholders and creditors from an order of ROSE, J., dated the 26th February, 1926, directing the winding-up of the company under the provisions of the Ontario Companies Act. The grounds of appeal were set forth in the notice of appeal as follows:—

1. That the learned Judge who made the order erred in his conclusions of fact upon the material and evidence filed by the petitioner.

2. That the order of the learned Judge was contrary to law.

3. That the learned Judge erred in his finding that this was a proper case for winding-up under sec. 187(c) of the Ontario Companies Act.\*

\* R.S.O. 1914, ch. 178, sec. 187: “A corporation may be wound up by order of the Supreme Court: . . . (c) Where in the opinion of the Court it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it should be wound up.”

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4. That the learned Judge erred in considering the question of insolvency upon an application founded on sec. 187(c).

March 19. The appeal was heard by LATCHFORD, C.J., MIDDLETON, MASTEN, and ORDE, JJ.A.

*George Wilkie, K.C.*, for the appellants, said that the application for winding-up was the result of a family quarrel, and argued that the company itself would be the proper forum for the settlement of the differences, instead of the Court through its winding-up process. He submitted that the rights of the shareholders were subordinate to those of the creditors. It would not be "just and equitable," having regard to the interests of the petitioner, the other shareholders, or the creditors, that the company should be wound up: *In re Professional Commercial and Industrial Benefit Building Society* (1871), L.R. 6 Ch. 856.

*W. D. McPherson, K.C.*, for *W. E. Shipway*, the petitioner, respondent, contended that the order should be allowed to stand. The only way to save anything for anybody was to wind up the company. Its insolvency was shewn by the report of the interim liquidator. As it would be futile to try to carry on the business, it would be "just and equitable" that the company should be wound up: *In re Diamond Fuel Co.* (1879), 13 Ch. D. 400; *In re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703; *In re Yenidje Tobacco Co. Ltd.*, [1916] 2 Ch. 426; *In re Newbridge Sanitary Steam Laundry Ltd.*, [1917] 1 I.R. 67; *Loch v. John Blackwood Ltd.*, [1924] A.C. 783.

At the close of the argument, THE COURT pronounced judgment allowing the appeal; and stated that written reasons would be given on a future day.

April 1. MASTEN, J.A.:—In the course of the discussion before us, Mr. McPherson very frankly and most properly informed the Court that from the report of the interim liquidator it clearly appeared that the company is utterly insolvent at the present time. This placed on the application an aspect entirely different from that which it presented when it was heard by my brother Rose. Not only does the statute, for constitutional reasons, exclude insolvency as a ground for winding-up, but the admission of insolvency sweeps away all interest of the petitioner in the result—the parties and the only parties really interested in case of insolvency being the creditors, where as here all the shares are fully paid-up. Mr. Wilkie, representing some of the largest of these creditors, states that they are opposed to a winding-up, considering it more in their interest, under the peculiar circumstances here existing, that the company should continue its operations. As pointed out by my

Lord at the close of the argument, the winding-up order is not in the interest of anybody. It is not in the interest of the petitioner, because his shares are valueless, and a winding-up puts an end to his employment, from which he is drawing a weekly wage of \$35.

Nor is it in the interest of the other shareholders who are opposing the winding-up, and who, like the petitioner, would suffer the loss of the employment and the wage which each of them is drawing. Nor is it in the interest of the creditors, who, so far as heard from, oppose the order—believing that they stand a better chance of getting paid if the business is continued.

In *In re Professional Commercial and Industrial Benefit Building Society*, L.R. 6 Ch. 856, Lord Justice Mellish says (pp. 863, 864):—

“The petition is presented by members who, no doubt, if the society were wound up, would be contributories, and they allege that the society is unable to pay its debts. Now, if a creditor cannot get paid—if he issues a proper summons and cannot get paid—then, no doubt, it is *ex debito justitiæ* to grant such a winding-up order. But when shareholders come for a winding-up order, it appears to me that it is the duty of the Court to see whether the other shareholders and the creditors agree in thinking that the winding-up is the best course. Now, here it is quite clear that if there are any creditors—which is extremely doubtful—the creditors, without an exception, and all the other shareholders, with the exception of the four who have presented this petition, and one other, agree that the best course is not to wind up. Under those circumstances, the Court, in my opinion, ought not to grant a winding-up order unless it sees that some plain injustice is being done to the members who present the petition which cannot be avoided otherwise than by giving them a winding-up order.”

The same view was expressed in the case of *In re City and County Bank* (1875), L.R. 10 Ch. 470, and *In re London Permanent Benefit Building Society* (1869), 20 L.T.R. 388, affirmed in appeal, 21 L.T.R. 8.

While the Ontario Companies Act does not appear to contain any section corresponding to sec. 145 of the English Act of 1908, the Court will, I think, on general principles, in the exercise of its discretionary power, have regard to the considerations indicated by these cases.

This ground would suffice to compel an allowance of the present appeal; but, in view of the argument which was addressed to us, perhaps a word further ought to be said in regard to the proper application of sec. 187(c).

The grounds upon which such orders have been made are set

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forth in the 10th edition of Buckley on Companies, pp. 315 to 318. It is not contended that any of the grounds so mentioned have any application to the circumstances of this case except the second, namely, that there is a deadlock. The note in Buckley under that heading is as follows:—

“A company may also be wound up where there is a complete deadlock in its management. But a mere domestic quarrel between two sets of shareholders will not be sufficient, the company itself being the proper forum for the settlement of domestic differences according to the powers of the majority under the constitution of the company. So where there are only two directors, who disagree, the majority of the shareholders, where it is possible to appoint an additional director, must decide, and this is so even if the majority control only one more vote than the minority.”

And the view so expressed is borne out by the cases cited, and was followed by the Court of Appeal in Alberta in the case of *Re Timbers Ltd.* (1917), 35 D.L.R. 431, and the winding-up order made. But that case and the case of *In re Yenidje Tobacco Co.*, [1916] 2 Ch. 426, have, in my opinion, no application where a substantial majority of the shareholders are opposed to the making of the order, where it is a mere domestic quarrel, and where no substantial advantage will accrue to the petitioner from the granting of the winding-up order.

For these reasons, the appeal must be allowed, and costs, if asked for, must follow the result. The disbursements of the interim liquidator made by him pending the appeal will form a charge upon the estate, but there should be no compensation.

LATCHFORD, C.J.:—My reasons for thinking this appeal should be allowed may be stated in a few words.

The parties concerned are the petitioner, the other shareholders, and the creditors of the company.

On the facts disclosed it was not “just and equitable,” in the interest of any one of these parties, that the winding-up order should have been made. It is not in the interest of the petitioner, as, the company being insolvent, he gets nothing by the order, nor in that of the other parties, as their only hope of realising anything out of the business depends upon its continuance.

I agree in the disposition of costs stated in the opinion of my brother Masten.

MIDDLETON and ORDE, JJ.A., agreed in the result.

*Appeal allowed.*

[HODGINS, J.A.]

LASTAR v. POUCHER.

1926.

April 3.

*Mortgage—Foreclosure—Account—Interest — Provisions of Antecedent Agreement—Commission—Bonus—Interest Act, R.S.C. 1906, ch. 120, secs. 6, 7—Substance of Transaction.*

The amount actually advanced by the plaintiff upon a second mortgage made by the defendants to her was \$3,000, but the mortgage was for \$5,000 and interest at 7 per cent. per annum. By an agreement between the parties, preceding the mortgage, it was agreed that the defendants should pay to the plaintiff's husband, out of the first proceeds of the loan of \$5,000, a commission of \$2,000 for obtaining and arranging the loan. Upon appeal from the report of an Assistant Master in an action for foreclosure:—

*Held*, that when the Court is asked to foreclose the rights of the mortgagors, the parties cannot avoid an inquiry into the amount due for principal and interest, even if that involves examining an antecedent transaction out of which the mortgage arose and to which it is collateral: nor is the Court bound by the form of the mortgage or the agreement, or the expressions used by the parties; it is the substance of the combined transactions that is important.

Therefore, the Assistant Master was right in taking the mortgage-account on the footing that the mortgage secured \$3,000 of principal. Interest Act, R.S.C. 1906, ch. 120, secs. 6 and 7, applied.

*Singer v. Goldhar* (1924), 55 O.L.R. 267, followed.

AN appeal by the plaintiff from the report of Assistant Master DREW in a foreclosure action.

Written reasons for his report were given by the Assistant Master as follows:—

The action is based upon a mortgage dated the 15th April, 1925, and also upon covenants of the defendants contained in an agreement bearing date the 14th April, 1925. It is referred to me to determine the amount due to the plaintiff by the defendants.

There is, practically, no conflicting evidence of any importance; the real dispute being one of law. The plaintiff claims the full amount stated to be owing under the mortgage and agreement, and the defendants set up, as a matter of law, that they are not bound to pay more than the amount actually advanced, with interest at 7 per cent. per annum.

Counsel for defendants submits the argument that under the Canada Interest Act, R.S.C. 1906, ch. 120, sec. 6, and the decision in *Singer v. Goldhar* (1924), 55 O.L.R. 267, the plaintiff cannot recover more than the amount of money actually advanced: that the sum of \$2,000 made payable to Lastar (the plaintiff's husband) as commission is, under the case referred to, interest, and, conse-

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quently, not having been so shewn in the mortgage, is not chargeable, under sec. 6 of the Interest Act.

Poucher does not deny that he was quite willing to pay back \$5,000 for the loan of \$3,000. He was a very intelligent witness, and his evidence was quite clear that he had no intention of repudiating the undertaking to pay \$5,000 in return for the loan. It was in no way forced upon him. He had tried in different ways to raise this money and had ample opportunity for considering the effect of the undertaking proposed, and from his ready understanding of questions concerning the various details I feel sure that he fully realised his responsibility, and that upon default in any payment the whole amount would become due and payable. He says, however, that he did not understand certain conditions of repayment required in order to discharge lots sold from the mortgage in question, and, having been informed that he is not obliged by law to pay the full amount, he does not propose to do so.

It is clear that under the English cases, and under our own cases, were it not for the Interest Act, he would be obliged to carry out his undertaking, and I would be inclined to exercise any discretion I might have in deciding that the full amount declared payable by the mortgage should be recovered. I am, however, confronted by a case which, as it stands, has very far-reaching effects. *Singer v. Goldhar*, in my opinion, contains three important decisions which have a direct bearing upon this case. It decides:—

(1) That the defendant is not estopped by the receipt clause from asserting that the amount acknowledged was not in fact advanced.

(2) That any amount made repayable by way of bonus for the loan is, under the definitions of “interest” quoted, “interest” within the meaning of the Canada Interest Act.

(3) That interest made payable by such method does not comply with the requirement of sec. 6 that the mortgage shall contain “a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.”

The mortgage upon which this action is brought differs from that under review in *Singer v. Goldhar* in one important respect. Interest is made chargeable at the rate of 7 per cent. per annum, whereas in the *Singer v. Goldhar* mortgage no interest rate was shewn. Counsel for the plaintiff contends that *Singer v. Goldhar* is not in point for that very reason, and that the Canada Interest Act is not applicable because this mortgage shews “the amount

of principal money and the rate of interest thereon," as required by sec. 6.

I do not agree with his contention. If this action were based only on the mortgage, I think the Interest Act would be clearly applicable.

There is, however, another question to consider. The writ of summons states that the claim is upon a mortgage and under and by virtue of covenants contained in a certain agreement. The agreement referred to, dated the 14th April, 1925, is executed by Myrtle Viola Poucher and Oscar Poucher (the defendants), Eva Lastar (the plaintiff), and Bernard Lastar, and is dated the 14th April, while the mortgage is dated the 15th. It provides that \$2,000 shall be paid to Bernard Lastar as commission for arranging the loan. Paragraph 2 of the agreement is as follows:—

"The said party of the fourth part (Bernard Lastar) hereby agrees to accept from the said parties of the first and second parts (Myrtle Viola Poucher and Oscar Poucher), who hereby agree (and hereby irrevocably authorise and direct the party of the third part for them and on their behalf and on their account) to pay him, out of the first proceeds of the said loan of \$5,000, a commission of \$2,000 for obtaining and arranging the said loan of \$5,000."

Paragraph 4 then provides, in part, that—

"The parties of the first and second parts shall, as security for the repayment to the party of the third part of the said principal sum of \$5,000 and interest, give her their joint and several promissory notes for the aforesaid instalments together with interest; and as collateral security they shall execute and deliver to her a third mortgage against the aforesaid lands and premises, guaranteed by the party of the second part, on a form and containing provisions similar to the said second mortgage" (a prior mortgage from the defendant Myrtle Viola Poucher to the plaintiff).

The agreement then makes provisions for the release of the mortgaged lands from the third mortgage, under which this action is brought, and the payment to the mortgagee of certain sums in respect of any of the lots comprising the mortgaged lands within three months after their sale by the mortgagor.

The details of the transaction were carried out by Mr. Lastar and Mr. Poucher, and neither of their wives, apparently, took any part in the proceedings except to sign the documents when they were completed. They gave evidence as their wives' representatives in each case, and the wives were not called. Lastar, in fact, carried the account from which these funds were drawn in his own name at the bank, stating, however, that it was his wife's

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money. While he did not, in this case, require to use it, he also swore that he had a power of attorney from his wife, so that he had full authority to bind her to any agreement which he deemed satisfactory.

Money had already been lent on a second mortgage of the same property by Mrs. Lastar. It was while Poucher was making one of the interest payments on the second mortgage to Lastar that they came to some understanding in regard to this loan. Lastar represented himself as having full authority to enter into whatever arrangement he, personally, approved, and by his own evidence had that authority on behalf of his wife, so that a payment of a commission to him of \$2,000 to use his services in obtaining this loan from his wife is an obvious absurdity. The \$2,000, which the agreement says is to be paid Lastar "for obtaining and arranging for them a loan of \$5,000 on the terms and conditions . . . set out," was not a commission for services rendered, but was a bonus offered to the mortgagee in order to obtain this loan. The mortgage and agreement form part of one transaction, which is essentially a mortgage transaction—one by which a certain sum of principal money and interest is secured by a mortgage of real estate.

Poucher stated that, although the agreement was dated one day before the mortgage, all the papers were signed at one time, and that Mr. Singer (solicitor for the plaintiff) said that the additional \$2,000 which Lastar wanted the mortgage drawn for could not be a bonus, but that they must come to some other arrangement.

I do not think there can be any question about the fact that the money was advanced upon the security of the mortgage, and that, instead of the mortgage being merely a collateral security, it was the primary security, and the agreement was only entered into for the purpose of avoiding the effect of sec. 6 of the Canada Interest Act.

There is no decided case directly in line with the facts in this case. It was stated by the learned Chief Justice of Canada in *Standard Reliance Mortgage Corporation v. Stubbs* (1917), 55 Can. S.C.R. 423, that "The 'Interest Act' (R.S.C. 1906, ch. 120) in part represents the statute 43 Vict. ch. 42. Until the year 1911, no case appears to have come before the courts depending upon this statute. In that year there was one in the court of the Province of Alberta and there were two last year. These three Alberta cases and the one now under appeal are the only cases in which the courts have been called on to construe the Act during the 37 years

that have elapsed since it was passed." Since that time apparently the only case of any importance reported is *Singer v. Goldhar*, already referred to. It is, indeed, regrettable that the law on this important question is not more clearly established, since bonus transactions similar to that now in question are not unusual where the advance is upon second or third mortgages.

I can only come to the conclusion that this is a mortgage transaction pure and simple; that \$3,000 was the principal money advanced and \$2,000 the bonus agreed to be paid. As this \$2,000 bonus, under the decision in *Singer v. Goldhar*, is interest, being "the return, or consideration, or compensation for the use or retention by one party of a sum of money . . . belonging to another" (55 O.L.R. at p. 270), and as the mortgage provides that the mortgage is to be void upon "the payment of \$5,000 of lawful money of Canada with interest to be computed from the date hereof at 7 per cent. as follows: \$850 of the said principal sum of \$5,000 on the 15th day of August, 1925, and the remaining \$4,150 thereof in five equal instalments of \$830 on the 15th day of December, 1925, the 15th days of April, August, and December, 1926, and the 15th day of April, 1927," it is apparent that so far as the \$2,000 "interest" is concerned the payments of principal and interest are blended within the meaning of sec. 6 of the Interest Act, and the decision in *Singer v. Goldhar*; and, therefore, this interest is not chargeable.

Section 7 reads as follows: "Whenever the rate of interest shewn in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shewn in such statement."

The rate shewn in this mortgage is 7 per cent.; and, while sec. 6 states that no interest shall be chargeable, these sections are plainly contradictory, and the only reasonable interpretation of sec. 7 is that the interest rate properly shewn is chargeable "on the principal advanced," while that which would be chargeable by the other provision is not recoverable.

I have, therefore, come to the conclusion that the amount due to the plaintiff by the defendants under and by virtue of the said mortgage is "the principal money advanced," amounting to \$3,000, with interest thereon to date at 7 per cent., less any moneys paid on account of the said mortgage. I do not recall any evidence that any payments had been made by the plaintiff to protect her interest under the said mortgage, and if any have been properly made they

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should be added to the amount of the plaintiff's claim before my report is signed.

I must confess that I have entertained some doubt as to the application of the Interest Act to this case, by reason of the separate agreement executed by the parties to the mortgage, purporting to create the full obligation of \$5,000 later secured by the mortgage. However, without attempting to interpret the purpose underlying the enactment of secs. 6 and 7, I can only come to the conclusion that those responsible for the drafting of the sections referred to could not have contemplated that their effect was to be nullified by some such collateral agreement as we have in this case.

The writ of summons herein also claims as a separate right the enforcement of the covenant for payment of \$5,000 in the said agreement. I have already stated that, in my opinion, the whole transaction was essentially one by which principal money was secured by a mortgage on real estate, and that the mortgage was in fact the primary security and the agreement providing for the payment of the bonus, or commission, or interest, as the \$2,000 declared to be payable to Bernard Lastar has been variously termed, was supplementary to the mortgage and for the purpose of avoiding the effect of the Interest Act. The form of the writ, itself, indicates that the agreement was only an incident in the transaction. I do not believe that such an agreement can possibly give a right to claim a greater amount than is recoverable under the covenants contained in the mortgage deed.

Section 6 of the Interest Act, it is true, limits the effect of the section to cases where the principal money or interest is secured by mortgage of real estate, and I believe it is the contention of the plaintiff that the money in question is not secured by a mortgage but by an agreement. There is no doubt that a bonus for a loan may be made repayable by a *bonâ fide* agreement, and that where such an agreement represents the actual nature of the transaction and provides the terms of repayment within the four corners of the agreement itself, the Interest Act does not apply and the bonus may be recovered in addition to the amount of the loan. But in this case the agreement is so obviously drawn for a specific purpose, other than to provide a payment of commission for services in arranging a loan, that one must examine the whole transaction.

By securing the repayment of the money lent by an "agreement," it is sought to avoid the effect of the Interest Act upon a loan secured by a "mortgage." The agreement is part of the mortgage transaction, and, therefore, cannot be separately considered. Any other conclusion would be contrary to the intent and



purpose of the Act. If the express intention of these sections is to be overcome by some parallel undertaking, simply because it is termed an "agreement" and not a "mortgage," but forming part of one transaction, then these sections would be rendered meaningless.

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March 29. The appeal was heard by HODGINS, J.A., in the Weekly Court, Toronto.

*L. M. Singer*, for the plaintiff.

*D. W. Lang*, for the defendants.

April 3. HODGINS, J.A.:—The question in debate is whether, in the circumstances of this action, very carefully set out in the report, the case of *Singer v. Goldhar*, 55 O.L.R. 267, is applicable. The Assistant Master has held that it is decisive, and consequently takes the mortgage-account on the footing that the mortgage in question secures \$3,000 of principal and not \$5,000.

The mortgage to the plaintiff, Mrs. Lastar, from the defendants is dated on the 15th April, 1925, and was preceded by an agreement between the same parties, including the plaintiff's husband, on the 14th April, 1925, the day previous. This agreement, after reciting a prior mortgage on the mortgaged property, and the desire of the defendants to erect a pavilion on the lands at a cost of about \$3,000, continues by saying that the defendants "have offered the party of the fourth part" (the plaintiff's husband), "who has agreed to accept from them, a commission of \$2,000 for obtaining and arranging for them a loan of \$5,000 on the terms and conditions hereinafter set out."

Then, in consideration of the foregoing, the loan of \$5,000 and its repayment with 7 per cent. interest are provided for, and, by clause 2, "The said party of the fourth part" (the plaintiff's husband) "hereby agrees to accept from the said parties of the first and second parts" (the defendants), "who hereby agree (and hereby irrevocably authorise and direct the party of the third part" (the plaintiff) "for them and on their behalf and on their account) to pay him, out of the first proceeds of the said loan of \$5,000, a commission of \$2,000 for obtaining and arranging the said loan of \$5,000."

By clause 4, promissory notes are to be given by the defendants for the instalments of principal and interest, and they further engage that "as collateral security they shall execute and deliver to her a third mortgage against the aforesaid lands and premises,



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guaranteed by the party of the second part, on a form and containing provisions similar to the said second mortgage."

Releases of portion of the land are provided for.

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The mortgage, dated on the following day, is drawn in the usual long form, and redemption is provided for on payment of \$5,000 and interest at 7 per cent. as therein set out.

The facts as detailed in the Master's report were not disputed, and the main contentions were: (1) that the mortgage itself conformed to the statute; (2) that it was collateral to the original indebtedness and to the agreement which capitalised the \$2,000, and that in the mortgage collateral to such an agreement it could not be regarded as interest; (3) that the Interest Act, R.S.C. 1906, ch. 120,\* should not be applied if its application made it the instrument of fraud on the earlier agreement; and (4) that there was no merger of the agreement in the mortgage.

These contentions all seem to converge on one and the same point, namely, that if a mortgage *primâ facie* conforms to the statute in naming a sum as principal and providing for a specific rate of interest thereon, the genesis of the indebtedness cannot be inquired into—a mixture put into a labelled bottle must be what the label calls it. But parties cannot make substantive law for themselves by agreement: *Rex v. Paulson*, [1921] 1 A.C. 271.

After considering the *Singer* case, I am unable to distinguish this case in principle from it. The parties cannot, I think, when they ask the Court to foreclose the rights of the mortgagors, avoid an inquiry into the amount due for principal and interest, even if that involves an examination of an antecedent transaction out of which the mortgage arose and to which it is collateral. Nor is the Court bound by the form of the mortgage or the agreement, or the expressions the parties have chosen to use: *Ex p. Delhasse* (1878), 7 Ch. D. 511, *per James, L.J.*, at p. 527. It is the sub-

\* Sections 6 and 7 of the Act are as follows:—

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

7. Whenever the rate of interest shewn in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shewn in such statement.

stance of the combined transactions that is important: *Kreglinger v. New Patagonia Meat and Cold Storage Co.*, [1914] A.C. 25. The case of *Cummings v. Silverwood* (1918), 11 Sask. 407, of course deserves consideration.

I dismiss the appeal with costs and affirm the Assistant Master, for the reasons given by him.

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*Will—Construction—“Issue”—Descendants of Son of Testator—Accumulation of Income—Limitation of Period for—Accumulations Act, R.S.O. 1914, ch. 110, sec. 2—Saving Clause, sec. 3—Devise—“Raising Portions”—Benefit of Issue—Class not yet Ascertained—Date of Ascertainment—Annuity—Intestacy as to Released Accumulations—Period of Distribution—Time of Vesting—Issue Taking per Capita.*

The testator devised and bequeathed all his property to trustees upon trust to manage the same during the lifetime of his widow; the income from the estate to be applied during her lifetime in payment (1) of \$3,000 a year to the widow for the support and maintenance of herself and the testator's son J.; and (2) in payment of \$1,500 a year to the testator's son F. for his own use while one of the trustees and personally assisting in the management of the estate. In case of deficiency in any year in the net income, the foregoing allowances were to abate proportionately. The portion of the net income in excess of the annual sum of \$4,500 was to be added to the capital of the estate, or the trustees might in their discretion proportionately increase the allowances. After the decease of the widow, and in case J. should survive—which was what happened—the trustees were to divide the estate as then existing into two equal parts, convey one portion absolutely to F., and apply the income of the other portion in payment to J. of the annual sum of \$1,200 for his maintenance, with power to increase such allowance as the trustees in their discretion should deem proper. The remaining portion of the net income from that part of the estate was to be added to the capital. After the death of J. the trustees were to hold the last mentioned portion of the estate in trust for the issue of F. surviving at the death of J.; and the net income arising from that portion of the estate was to be paid to F. (if living, otherwise to the guardians of the said issue) for the maintenance and education of such issue until the youngest should attain the age of 21 years, when the corpus should be equally divided among such issue. The testator died in March, 1901; the widow in November, 1922. At the time when this application for the opinion of the Court was made, F. had three children living, all of age, one (M.) born after the death of the testator: —

*Held*, that the word “issue,” as used by the testator, meant “descendants,” and the bequest was not limited to “children.”

*Cook v. Cook* (1706), 2 Vern. 545, followed.

(2) That the first provision for the accumulation of income, that relating to the excess of the income over \$4,500 *per annum*, was,

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under the Accumulations Act, valid only for 21 years from the death of the testator, that is until March, 1922; from that date until the death of the widow in November, 1922, the direction for accumulation was null and void.

(3) That "child," in sec. 3 of the Act, means a legitimate descendant of the first degree, and does not include grandchildren or other remote descendants; and, although the provisions of the will were "for raising portions," within the meaning of sec. 3, the exemption provided by that section did not apply.

The children whose portions are to be raised must be definitely known or ascertainable at the testator's death.

*Burt v. Sturt* (1853), 10 Hare 415, 90 R.R. 414, 423, and *In re Deloitte*, [1926] 1 Ch. 56, referred to.

On the death of the widow a division of the estate was directed by the will; the period of 21 years had then elapsed; and the direction for further accumulation was void thereafter except as to the annuity payable to J., which was within the exemption mentioned in sec. 3.

(4) As to the accumulations released from the provisions of the will, there is an intestacy, there being no residuary clause.

(5) The class of issue is to be ascertained at the death of J., and the share of each member of the class will vest at that date, even though the period of distribution has not then arrived; the issue take *per capita* and not *per stirpes*.

(6) M. is entitled to share in the bequest if she should be living at the death of J.

MOTION by the executors and trustees under the will of Joseph Davidson, deceased, for an order determining certain questions arising in the administration of the testator's estate as to the true construction of his will.

March 17. The motion was heard by WRIGHT, J., in the Weekly Court, Toronto.

*H. J. Scott*, K.C., for the applicants.

*D. W. Saunders*, K.C., for M. A. Baroudi.

*G. E. Newman*, for J. J. Davidson and Edith F. Graham.

*Lyle Ramsey*, for the Official Guardian, representing infants interested.

April 13. WRIGHT, J.:—Upon the hearing of the motion, an order was made that the Official Guardian should represent all the infants interested, including those unborn.

The questions submitted for determination are as follows:—

(a) Whether the accumulation contained in the following proviso in the said will, namely, "The remaining portion of said net income to be added to the capital of said portion of my estate," is null and void under the provisions of R.S.O. 1914, ch. 110, which is known as the Accumulations Act.

(b) If the said proviso is null and void, who in the meantime are entitled to the said income?



(c) Whether Marcia Alysoune Davidson (now Baroudi), a daughter of Frederick J. A. Davidson, born on the 25th day of March, 1903, is or ever will be entitled to any share in the portion of the estate described in the said will as follows:—

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"After the decease of the said Judson France Davidson I direct that my said trustees shall hold the said last mentioned portion of my estate in trust for the issue of my son Frederick J. A. Davidson surviving at the date of the decease of the said Judson France Davidson. I direct thereafter the net income arising from the said portion of my estate until the youngest shall attain the age of 21 years to be paid for the maintenance and education of such issue to the said Frederick J. A. Davidson (if living, otherwise to be paid to the guardian of the said issue), and the corpus to be equally divided among such issue when the youngest shall attain as aforesaid the age of 21 years."

(d) Whether the trustees, Frederick J. A. Davidson and Joseph Jocelyn Davidson, are now empowered under the said will to divide the said estate into two equal portions in the said will referred to.

Upon the hearing of the motion, a further supplementary question was added, and it may be numbered as (e).

(e) Whether "issue" referred to in question (c) means "children," and whether the issue of any grandchild dying before the period of distribution will be entitled to the parent's share or whether all issue take equally; or if all grandchildren die before such period is there an intestacy even if they have left issue?

The testator died on or about the 1st March, 1901.

Frederick J. A. Davidson and Judson France Davidson, mentioned in the will as sons of the deceased, are still alive.

Caroline Davidson, the widow of the testator, died on the 18th November, 1922, and in her stead Joseph Jocelyn Davidson was appointed as a trustee of the will, by an order of the Supreme Court of Ontario dated the 25th April, 1923.

Frederick J. A. Davidson has at present three children living, namely, Joseph Jocelyn Davidson, born on the 18th November, 1892; Edith Frederica Graham, born on the 8th May, 1896; Marcia Alysoune Baroudi, born on the 25th March, 1903. It will be noted that Marcia Baroudi was born after the death of her grandfather, the testator.

The questions submitted raise some interesting as well as difficult problems, and it may be well to give a general summary of the provisions of the will.

- The testator devised and bequeathed all his property to the trustees upon trust to manage the same during the lifetime of his



Wright, J. 'wife Caroline Davidson. The income from the estate during the  
1926. lifetime of the widow was to be applied as follows:—

RE (1) Three thousand dollars to be paid to the said Caroline  
DAVIDSON. Davidson for the support and maintenance of herself and Judson  
France Davidson.

(2) The annual sum of \$1,500 to be paid to Frederick J. A. Davidson for his own use while one of the trustees and personally assisting in the management of the estate.

(3) In case of deficiency in any year in the net income, the foregoing allowances were to abate in proportion.

(4) The portion of the net income in excess of the annual sum of \$4,500 was directed to be added to the capital of the estate, or the trustees might in their discretion proportionately increase the allowances to the legatees already mentioned.

(5) After the decease of the widow, and in case the said Judson France Davidson should survive—an event which has happened—the trustees were directed to divide the estate as then existing into two equal portions, one portion of which they were directed to convey absolutely to Frederick J. A. Davidson, and to apply the income of the other portion as follows:—

(a) To pay the annual sum of \$1,200 to Judson France Davidson for his maintenance with power to increase such allowance as the trustees should in their discretion deem proper.

(b) The remaining portion of said net income to be added to the capital of said portion of the estate.

The remaining provisions of the will, so far as material to this motion, are set out in question (c).

In my view, the key to the solution of the problems raised for decision will be found in the meaning assigned to the term "issue."

It will be noted that after the decease of Judson France Davidson the will directs the trustees to hold the corpus and accumulated income in trust for the issue of Frederick J. A. Davidson surviving at the date of the decease of the said Judson France Davidson, with a further direction that during the minority of the youngest of such issue the net income shall be paid to Frederick J. A. Davidson (if living, otherwise to be paid to the guardian of such issue), for the maintenance and education of such issue.

This raises the question squarely: Does the term "issue" as used here bear its normal, *primâ facie* meaning of "descendants," or is it to be given the more restricted or restrained meaning of "children?"

The authorities are in agreement that ordinarily and normally the word "issue" means "descendants." If authority is needed I

would refer to Jarman on Wills, 6th ed., p. 1590; Theobald on Wills, 5th ed., p. 290, and cases there cited.

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The term "issue" is a flexible one, and if the context or the general scheme of the will shews that the testator intended that it should receive the more restricted meaning of children, then it should be so construed.

I have read the will carefully to see if there is anything to limit or restrict the normal meaning, and find that the only provision that might indicate such an intention on the testator's part is that which directs the payment to be made to Frederick J. A. Davidson or the guardian of the issue during the minority of the youngest of such issue for their maintenance and education.

It might be contended with some force that this shews an intention on the testator's part to restrict issue to children, as it could hardly be anticipated that Frederick J. A. Davidson would have charge of the maintenance and education of his grandchildren or great-grandchildren, or that in case of his death during the period of minority of the youngest, a guardian would be required in the case of his grandchildren whose parents were then living.

Notwithstanding this view, I am unable to bring my mind to the conclusion that there is sufficient in the context to limit issue to children. I am therefore—though with considerable hesitation—constrained to hold that "issue" must be taken in its normal sense of "descendants."

At this juncture I would refer to *Cook v. Cook* (1706), 2 Vern. 545, where it was held that a devise to the issue of A was to the descendants of A.

Turning now to the point involved in question (a), which concerns the provisions of the Accumulations Act, it may be helpful to state the contentions of the counsel representing the various interests.

Counsel for the executors or trustees contends that the provisions as to accumulation of income directly offend against the provisions of the statute.\*

\* Section 2 of the Accumulations Act provides as follows:—

(1) No person shall, by any deed, surrender, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer than one of the following terms, viz.:

(a) For the life of the grantor;

(b) For 21 years from the death of the grantor or testator;

(c) For the period of minority of any person living, or *en ventre sa mere*, at the death of the grantor or testator;

(d) For the period of minority of any person who, under the instrument directing the accumulation, would for the time being, if of

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Mr. Saunders, for Marcia Baroudi, contends that the accumulations were valid up to the 1st March, 1922 (i.e., for 21 years after the testator's death), and thereafter were null and void, and that there is an intestacy as to the void accumulations. He further contends that the accumulations are saved by sec. 3\* of the Act as being made for the purpose of raising portions for children.

Mr. Newman adopts this contention, but qualifies it by claiming that only those children of Frederick J. A. Davidson who were living at the testator's death should participate. This would, if sustained, exclude Marcia Baroudi from all benefits.

Mr. Ramsey, for the Official Guardian, adopts Mr. Saunders's argument as to the application of sec. 3 and contends that this section applies to grandchildren as well as children.

The first provision for accumulation of income is that relating to the excess of the income over \$4,500 *per annum*, and is, I think, valid only for 21 years from the death, that is, to March, 1922. From that date until the death of Caroline Davidson in November, 1922, the direction for accumulation is null and void, although that would not affect any substantial amount.

On the death of Caroline Davidson a division of the estate was directed by the will; and, unless it be held that this created a new starting point for the accumulation of income, the period of 21 years had then elapsed, and further accumulation would be void unless saved by the provisions of sec. 3.

It will now be in order to deal with the provisions of this last mentioned section, as the question of its application in this case is of vital importance. This section exempts from the operation of the statute accumulations of income made for the pur-

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full age, be entitled to the income, or rents and profits, directed to be accumulated.

(2) No accumulation for the purchase of land shall be directed for any longer period than that mentioned in the preceding subsection.

(3) Where an accumulation is directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person as would have been entitled thereto, if such accumulation had not been directed.

\* 3. Nothing in this Act shall extend to any provision for payment of debts of any grantor, settlor or devisor, or other person, or to any provision for raising portions for any child of any grantor, settlor, or devisor, or for any child of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but all such provisions and directions shall and may be made and given as if this Act had not passed.

pose of raising portions for any child of any person taking any interest under any such conveyance, settlement, or *devise*.

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In *Barrington v. Liddell* (1852), 2 DeG. M. & G. 480, the Lord Chancellor, Lord St. Leonards, construed "devise" as equivalent to "will," and held that it was not necessary that the interest taken by the parent should be an interest in the fund to be accumulated, but that it would be sufficient for the purpose of the exempting clause if such interest was taken under any provision of the will. See also *Burt v. Sturt* (1853), 10 Hare 415, and Halsbury's Laws of England, vol. 22, para. 771.

It would appear that the provisions of this will are for raising portions within the principles enunciated in *In re Stephens*, [1904] 1 Ch. 322.

This advances the matter considerably, but there remains another step to consider, viz.: Are the persons to receive the portions thus raised to be deemed children of a person taking an interest under the will? In this case such person is Frederick J. A. Davidson.

Again referring to the provisions of the clause in question, it will be observed that the accumulations are for the benefit of "the issue of my son Frederick J. A. Davidson surviving at the date of the decease of the said Judson France Davidson."

In view of my holding that issue here means "descendants" and not children, it seems reasonably clear that the exemption clauses of the statute do not apply. I am of opinion that "child," as used in the statute, means a legitimate descendant of the first degree, and is not intended to include grandchildren or other remote descendants.

Another insurmountable objection appears to me to arise from the fact that the issue to share are indefinite and not ascertained at the time of the testator's death. This test was stated and applied by Woods, V.-C., in *Burt v. Sturt*, 10 Hare 415, 90 R.R. 414 (see particularly at p. 423 of the last report, where the Vice-Chancellor states the sole ground of his decision to be that the words of the will then under discussion were not a direction in any shape intended for raising the portion of any given child, but a mere chance limitation to the surviving grandchild, whoever he may be).

The underlying principle of this decision requires that the children whose portions are directed to be raised shall be definitely known or ascertainable at the testator's death, and this appears to have been recognised in the recent case of *In re Deloitte*. [1926] 1 Ch. 56.



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The result which I have arrived at, with some regret, is that the saving clause of the statute does not apply, and that the direction to accumulate is valid only for the period of 21 years from the testator's death, and is void thereafter, except as to the annuity payable to Judson France Davidson, which is clearly within the exemptions mentioned in sec. 3 of the Accumulations Act.

As to the accumulations released from the provisions of the will, there is an intestacy, as there is no residuary clause in the will into which they would otherwise fall. See *Re Parry* (1889), 60 L.T.R. 489; *Ralph v. Carrick* (1879), 11 Ch. D. 873.

It would appear that the effect of the statute is not to accelerate the legacies under the will, so that in this case the period of distribution will remain as at the date mentioned in the will, viz., when the youngest of the issue of Frederick J. A. Davidson surviving at the death of Judson France Davidson attains the age of 21 years.

Dealing with the other points presented in supplementary question (e), I am of opinion that the share of each of the issue vests at the death of Judson Frances Davidson, even though the period of distribution has not then arrived.

See Theobald on Wills, 5th ed., p. 506, and cases there cited; also Jarman on Wills, 6th ed., p. 1400.

The issue take *per capita* and not *per stirpes*. See Theobald, p. 272.

The rule laid down in *Andrews v. Partington* (1791), 3 Bro. C.C. 401, has no application here. The will clearly fixes the date at which the class is to be ascertained, namely, at the death of Judson France Davidson, and the period of distribution is at a later date, so that it is not necessary to invoke the rule in *Andrews v. Partington*, which, as stated by Buckley, J., in *In re Stephens, supra*, is merely a rule of convenience and is never applied unless it is necessary.

Summarising the result, my answers to the questions submitted are:—

(a) The direction to accumulate is null and void after March, 1922, except as to the income payable to Judson France Davidson.

(b) There is an intestacy as to the accumulations released by the statute to the extent mentioned in the answer to question (a).

(c) Marcia A. Davidson (now Baroudi) is entitled to share in the bequest if she is living at the death of Judson F. Davidson.

(d) The trustees are empowered to divide the estate as directed by the will, except that portion represented by accumulations between March, 1922, and November, 1922, in respect of which there

is an intestacy so far as relates to the excess after the specific legacies or annuities are paid.

(e) "Issue" has its normal meaning, "descendants."

The interest of any of the issue who survive Judson France Davidson becomes at that date a vested interest.

Such issue take *per capita* and not *per stirpes*.

The costs of all parties are to be paid out of the estate; those of the executors as between solicitor and client.

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[APPELLATE DIVISION.]

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April 16.

*Slander—Privileged Occasion—Mentioning Name of Plaintiff—Whether Relevant to Privileged Communication—Malice.*

The defendant and N. were office-holders in a church, and the defendant told N. that the minister of the church had been guilty of adultery with the plaintiff, giving her name. There was no evidence of actual malice:—

*Held*, in an action for slander, that the occasion was privileged, and (LATCHFORD, C.J., and RIDDELL, J.A., dissenting), that the privilege extended to the mention of the plaintiff's name, that being relevant to the privileged communication made to the defendant with regard to the minister.

Review of the authorities.

*Adam v. Ward*, [1917] A.C. 309, 321, specially referred to.

APPEAL by the defendant from the judgment of the County Court of the County of Lennox and Addington awarding the plaintiff \$100 and costs in an action for slander, tried with a jury.

The question raised by the appeal was whether or not the trial Judge's ruling that the words of which the plaintiff complained in para. 2 of the statement of claim were not spoken upon a privileged occasion was right.

February 19. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

A. B. Cunningham, K.C., for the appellant, contended that the communication and the occasion of the communication were privileged. This rebutted the presumption of malice. The communication could not have been satisfactorily made without mention of the plaintiff's name. In any event, the mere mention of the plaintiff's name was not sufficient to destroy the privilege. Reference to *Nevill v. Fine Arts and General Insurance Co.*, [1895] 2 Q.B. 156, 170, [1897] A.C. 68; *Davies v. Snead* (1870), L.R. 5 Q.B. 608.

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*W. S. Herrington*, K.C., for the plaintiff, respondent, contended that neither the communication nor the occasion thereof was privileged. In any event, the privilege was lost by the mention of the name of the plaintiff. The presumption of malice was not rebutted. Reference to *Gatley on Libel and Slander* (1924), p. 222; *Harrison v. Bush* (1855), 5 E. & B. 344; *Hebditch v. MacIlwaine*, [1894] 2 Q.B. 54.

April 16. MIDDLETON, J.A.:—The whole question arising upon this appeal is whether the trial Judge was right in ruling that the words of which the plaintiff complains in para. 2 were not spoken upon a privileged occasion.

The defendant and Nelson, to whom the words were spoken, were both members of and office-holders in the Society of Friends. A charge had been made against a minister in charge of a congregation of that society, imputing that he had been guilty of adultery with the plaintiff. The charge was circumstantial, and, put shortly, was that the plaintiff had taken her children from her house to her neighbour's, and that the minister was with her in her house in the absence of all others, all evening, and until an early hour in the morning. This story, which was widely circulated, had, in the language of the defendant, "kindled hell-fire in our society," and, "that this fire might be quieted," he had consulted Nelson. In making the communication to Nelson the plaintiff's name was naturally mentioned. In fact it would have been impossible to have made any fair presentation of the complaint against the minister without using her name, unless circumlocution had been resorted to. She might have been called "Mrs. A.," or "a certain lady," but even then it appears to me that the identity of the person with whom the minister was supposed to have misconducted himself would be an important factor in considering the case.

What is suggested is that, although the occasion was privileged so far as the discussion related to the minister, it was not privileged so far as the plaintiff was concerned, for neither the defendant nor Nelson had either duty or interest concerning her character and actions.

In my view, this contention is based upon a complete misunderstanding of the law. When once it is shewn that the words were spoken upon a privileged occasion, this rebuts the presumption of malice which would otherwise arise, and the plaintiff is unable to succeed unless proof is given of the existence of actual malice. I do not for one moment suggest that, because there is a duty or interest which creates the privilege, this opens the door to the dis-

discussion of irrelevant matters or affords any protection in respect to utterances entirely foreign to the occasion; but, in my view, the protection extends to all communications pertinent to the discussion giving rise to the privilege. The discussion upon a privileged occasion must not take too wide a range, and go beyond its legitimate field, or the privilege will be entirely lost; and, furthermore, the mere fact of the dragging in of matters foreign to the discussion, or the names of other parties, will be, in itself, evidence of malice; but, so long as all that is said is fairly warranted by the occasion, the protection is complete.

I shall confine myself to the citation of few authorities because I have found none determining the precise point now presented, though many throw light upon it.

In *Jenoure v. Delmege*, [1891] A.C. 73, Lord Macnaghten, delivering the judgment of the Privy Council, says (p. 78) "that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. 'The proper meaning of a privileged communication,' as Parke, B., observes—*Wright v. Woodgate* (1835), 2 C.M. & R. 573, 577—"is only this: that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.'"

In *Stuart v. Bell*, [1891] 2 Q.B. 341, Lord Lindley says (p. 345):—

"A privileged communication is one made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously.

"A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language."

In *Davies v. Snead*, L.R. 5 Q.B. 608, the head-note, I think, correctly states the views of the Judges. It reads:—

"When words imputing misconduct, of which two persons are alleged to have been jointly guilty, are spoken to one of them under circumstances which make the communication privileged as to him, the slanderous statement is privileged as to the other, and the latter cannot maintain an action for defamation."

This differs from the case in hand only because the words were spoken *to* the one, and not *of* the one, but, I think, the rule is

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equally applicable where the words are spoken to a third party. The words of Blackburn, J. (L.R. 5 Q.B. at p. 611), are very applicable here:—

“I cannot help thinking that when a parishioner hears matters injurious to the clergyman, which would injure his authority and influence as a clergyman, if those facts are *bonâ fide* told under the belief that they are important for him to know, they come within the category of privileged communications.”

Mellor, J. (p. 612), also adds words here important:—

“It was contended that the privilege would not include her mention of the plaintiff, but I think that was answered by saying that it was impossible to exclude the reference to the plaintiff and yet tell Mr. Harris the slanders against him.”

In *Nevill v. Fine Arts and General Insurance Co.*, [1895] 2 Q.B. 156, at p. 170, the line of distinction is, I think, indicated by what is there said by Lord Esher:—

“There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion. But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice.”

*Adam v. Ward*, [1917] A.C. 309, is a recent decision of such importance as to dwarf all the earlier discussion. The principle established is laid down in the head-note thus:—

“Where a libel contains defamatory matter not referable to the duty or interest which gives rise to the privileged occasion, such matter is outside the occasion, and is not protected: and such excess of privilege in part of a defamatory publication may also be evidence of malice as to the whole of it. Excessive language in regard to a matter within the privileged occasion is material only as evidence of malice, and, *semble*, in determining whether such language is evidence of malice, it will not be subjected to strict scrutiny.”

Earl Loreburn says (pp. 320, 321):—

“But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the Judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion, or has given it a publicity incommensurate to the occasion.”

To the same effect is what is said by Lord Dunedin (pp. 327, 328):—

“If the defamatory statement is quite unconnected with and irrelevant to the main statement which is *ex hypothesi* privileged, then I think it is more accurate to say that the privilege does not extend thereto than to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory statement is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it, and under it will also range all the cases where the express malice is arguable from the too great severity or redundancy of the expressions used in the privileged document itself. . . . There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion.”

These quotations, I think, justify the view which I entertain that this communication was privileged, and that the discussion, in so far as it implicated the plaintiff, was an essential part of the subject-matter which gave rise to the privilege. It may be that the mention of the plaintiff's name could have been avoided. I do not think this is so, but, even so, all the cases agree in stating that the benefit of the doubt is to be given to the person making the statement, and his words are not to be too closely scrutinised.

I think the appeal should be allowed and the action should be dismissed. There is not the slightest evidence to shew that there was any malice towards the plaintiff.

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App. Div.      MASTEN, J.A.:—Having had the opportunity of perusing the  
1926.      reasons for judgment which have been prepared by my brother  
KNAPP      Riddell and by my brother Middleton, I find that, though they differ  
v.      in their conclusions, yet the principles of law established by the  
MCLEOD.      cases cited by each of them seem to agree. The difference appears  
Masten, J.A.      to arise in regard to the application of the principles to the particu-  
lar facts of this case. The facts are fully stated in the judgments  
of my brethren and need not be repeated by me.

My view, upon consideration of the circumstances in question, coincides with that of my brother Middleton. It seems to be clear law that, if the occasion is one of qualified privilege, actual malice must be shewn either by the defamatory statements being unconnected with and irrelevant to the privilege, or from the too great severity or other similar quality of the expressions used in making a statement which otherwise would be privileged. The principle is to be applied having regard to the general habits, customs, and capacities of the average man. Now, how would an ordinary citizen, impelled by a sense of duty to his church and his fellow-members, make the communication in question and tell the story? Would he not consider the name of the lady entirely relevant to the communication he was making? In point of fact if he thought about it at all, he would probably consider the name to be an essential part of the communication. No doubt, a lawyer versed in the law of slander, and in the question of qualified privilege, who was also possessed of a large bump of caution, might when making the communication in question christen the lady "Mrs. A.," but would it ever occur to the man in the street to do so? I think not.

I am therefore of opinion that the mention of the lady's name does not establish malice and that the appeal should be allowed and the action should be dismissed.

ORDE, J.A.:—Where, as in the present case, the statement complained of was made upon a privileged occasion, and it is alleged that the privilege was exceeded, the first question to be determined is whether or not what is alleged to be excessive is so far beyond the occasion as to be irrelevant to it, and therefore outside the benefit of the privilege as a defence.

But the mere fact that a statement otherwise within the privilege may be in some respects excessive does not necessarily exclude the excessive matter from the privilege if relevant to the main statement. The excess is then only material upon the question of malice: Lord Esher in *Nevill v. Fine Arts and General Insurance Co.*, [1895] 2 Q.B. 156, at p. 170; Lord Dunedin in *Adam v. Ward*, [1917] A.C. 309, at pp. 326-328.



The excess may take one of three forms. The defendant may have gone beyond his duty or the common interest in the character of the statements made about the person as to whom the communication is otherwise privileged. Or he may have made a statement otherwise privileged in the presence of a third person outside the privilege. Or he may, while making a privileged communication, have made a defamatory statement about some person outside the privilege—the present case. The law seems to be clear that in none of the three cases does the mere fact that the communication has gone beyond what might be thought to be the strict limits of the privileged occasion, exclude the plea of privilege as a defence, if the excess is really relevant.

The two cases referred to above are typical examples of excessive statements of the first and third kinds that I have mentioned. The well-known case of *Toogood v. Spyring* (1834), 1 C.M. & R. 181, is an example of the second. In that case Baron Parke observed (p. 194) that “the business of life could not be well carried on if such restraints were imposed upon this and similar communications.” His judgment has received the stamp of approval in many later cases, and what he says with reference to a statement published to a person outside the privilege is equally applicable to a statement made *about* one outside the privilege.

I agree with the judgment of my brother Middleton that the statement as to the plaintiff was, in the circumstances, so relevant to the main statement that it comes within the privilege.

The burden of proving malice was therefore upon the plaintiff. Of actual malice towards her, there was no proof, nor was there any evidence from which such malice could be inferred. I had at first some doubt as to whether or not the trial Judge ought not to have instructed the jury that they might infer malice from the fact that the plaintiff's name had been mentioned, but I have come to the conclusion that to have done so would be an indirect way of destroying the effect of the plea of privilege, and that, while the mention of the plaintiff's name upon the privileged occasion may be material as evidence of malice (Lord Esher in the *Nevill* case), yet there must be more than that alone upon which to base such a finding.

I think the appeal should be allowed and the action dismissed with costs.

LATCHFORD, C.J.:—This appeal from the judgment of his Honour J. E. Madden, Esquire, of the 8th December, 1925, after trial before a jury, awarding the plaintiff \$100 damages in a slander action, is restricted to the question of whether the undoubtedly

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defamatory statement of the defendant to Edward Nelson, regarding the plaintiff's improper relations with a minister of the Society of Friends named Orvis, was made upon such an occasion that the *primâ facie* presumption of malice was rebutted.

The defendant is a member of the Society of Friends, and an elder of the Kingston Monthly Meeting Board, which is made up of representatives of three or four congregations. The next higher organisation is the Quarterly Meeting Board, and above that is the Yearly Home Mission Board.

The plaintiff is a widow with three children. She was not a member of the Society of Friends, though meetings had occasionally been held at her house.

On a day in June, 1925, when a meeting of a Board was held at the village of Wooler, McLeod had a conversation with Nelson outside the place where the meeting was held. The defendant testified that he told Nelson "of the rumours going on at Moscow, 13 Island Lake, and the Back street, which had kindled hell-fire in our society. I told him to take the message to the Home Mission Board, and for it to quietly examine the cause, and then this fire might quiet down. As for the truth, I told him I did not know. I said that the air was full of rumours."

On cross-examination: "I had a vision that something was going to happen to our church. The vision was before Orvis came to Moscow. I believed the vision and I was actuated by the vision. I believed it would come as I saw it. I thought prophecy had come true when I heard the rumour, that is, the vision had come true. Did not see the plaintiff's character in the matter at all; did not take trouble to investigate reports as to their truth. I believe the story might be injurious to her character. Orvis and Mrs. Knapp, the plaintiff, were not discussed at the meeting. According to the disciplines and rules of the society, the matter should be brought up at the meeting first. I tried to get Orvis removed. I thought that the best way to get the noise quieted down. I had a complaint against Orvis . . . I did not take the complaint to the Monthly Meeting. I did not follow the rules."

From the Discipline of the Society, filed as an exhibit, it appears (p. 38) that the designation of a member as a minister is made by the Monthly Meeting, but must be approved by the Quarterly and Yearly Meetings. It is the Monthly Meeting also (p. 39) that has power to rescind such a designation when the Quarterly Meeting decides and reports that in its judgment a minister has lost his gift in the ministry.

Overseers or elders like McLeod had a duty to extend care and reproof in cases of conduct unbecoming a Christian, and, if due

care and labour in that direction proved ineffectual, to enter complaint to the Monthly Meeting against the offender: c. 5, s. 4.

The duty of the defendant under the Discipline was, therefore, at the most, to report his misgivings to the Monthly Meeting and not to Nelson, who was not a member of that or the Quarterly Meeting. Two members of the Yearly Meeting, Messrs. Cody and Terrill, deposed that he was not a member of that Meeting, though the defendant seems to have thought that Nelson was a delegate to it. It is plain, however, that the Yearly Meeting was without jurisdiction over the matter, and the defendant made no complaint about the minister at the Monthly Meeting, as required by the Discipline, which he admits he did not follow.

Before action was brought, Mr. Herrington's firm wrote to the defendant regarding the defamatory statement, reminding him of the ease with which a woman's reputation may be destroyed, and assuring him that there was no foundation for the slanderous story. A form of apology which the defendant was requested to sign, or face an action for damages, was enclosed. It runs as follows:—

"I hereby apologise to Mrs. Cynthia Knapp for having circulated a report reflecting upon her chastity. There was no foundation for such a report, and I have no reason to believe that the said statements made by me were true."

The defendant refused to sign the apology. It is not clear whether it was this or a different apology which the witness Cody, also a member of the Society of Friends, asked the defendant to sign. McLeod said: "Cody came back again with the apology changed, but I still refused to sign it. The Orvis affair was hurting my church."

According to the evidence, the statement regarding Mrs. Knapp's adulterous relation with Orvis had no foundation in fact. It was false as well as defamatory. As appears from the admissions of the defendant which I have quoted, it was made without investigation and without regard to the injury which the defendant says he believed it would cause to her reputation. Further, when opportunities were considerably afforded him, he refused to retract his slander of the plaintiff.

Assuming (without deciding) that the statement regarding the minister was privileged in the circumstances, I am of the opinion that neither the communication nor the occasion was privileged in regard to Mrs. Knapp, and that the learned trial Judge was right in holding that the presumption of malice was not rebutted.

In this connection it is to be remembered that the church of which McLeod and Nelson were members was equally hurt no

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matter with what particular person the alleged offence was committed. It was therefore possible for the defendant to discharge any moral duty that he felt incumbent upon him without mentioning Mrs. Knapp's name.

In *London Association for Protection of Trade v. Greenlands Ltd.*, [1916] 2 A.C. 15, Lord Buckmaster observed (p. 26) "that in determining what is a privileged occasion all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no." In the same case the law was approved as stated in *Toogood v. Spyring*, 1 C.M. & R. 181, by Baron Parke, who said (p. 193), in reference to privileged communications: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society." Lord Atkinson (p. 33) thought that this statement as to what constitutes a privileged occasion could not be improved upon, but adds: "In the earlier portion of the passage, however, he (Parke, B.) had said that the law considers such a publication as malicious unless it is fairly made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." "These are apparently," Lord Atkinson continues, "the tests by which, in the learned Judge's opinion, it may be determined whether defamatory matter has been published under circumstances which rebut implied malice. In the latter part of the passage he gives the reason why a publication which fulfils these tests is protected, and that reason is 'the common convenience and protection of society.' But Parke, B., never meant, I think, to lay it down that implied malice is taken to be rebutted where these tests have not been fulfilled, although the common interest and protection of society might be served by the publication of the defamatory matter in question.

In *Nevill v. Fine Arts and General Insurance Co.*, [1895] 2 Q.B. 156 (C.A.), and [1897] A.C. 68, the occasion was clearly privileged, and the only question was whether it was abused. It was held that there was no evidence of actual malice.

An observation of Lord Esher appearing in the judgment of the Court of Appeal (p. 170) is worthy of citation: "Where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion . . . that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion."



It is quite possible that the defendant may have thought some duty rested upon him to mention Mrs. Knapp's name, but, as was said by Byles, J., in *Whiteley v. Adams* (1863), 16 C.B.N.S. 392, 412: "The question is, what is the defendant's duty; not what he *thinks* to be his duty." "A man ought not to be protected if he publishes what is in fact untrue of some one else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he in fact publishes it:" *per* Earl Loreburn in *Adam v. Ward*, [1917] A.C. 309, 321.

It is proper, of course, as was said in the same case by Lord Dunedin, that nice scales should not be used in determining malice. His words apply where privilege exists, and the point for consideration there, as in the *Nevill* case, was whether the privilege existing was so exceeded that malice was merely a matter of implication.

In my humble opinion, the facts in the case at bar—especially the falseness of the defamatory communication, volunteered unnecessarily by the defendant to Nelson, and not retracted—fully warranted the trial Judge in his finding of malice. I would therefore dismiss the appeal.

RIDDELL, J.A.:—This is an appeal from the judgment of the County Court of the County of Lennox and Addington; and is based wholly on an alleged error in law in the charge to the jury at the trial of an action for slander.

There were three defamatory statements proved; and, counsel for the defendant arguing that they were all privileged, the learned County Court Judge ruled in the following terms:—

"I find that the first occasion on which the words complained of were uttered, as stated in para. 2 of the statement of claim, was not a privileged occasion. I find that the second occasion, as stated in para. 3 of the statement of claim, was an occasion of qualified privilege; but, as there was some evidence of malice, I direct the question of malice be determined by the jury. I find that the third occasion, as mentioned in para. 4 of the statement of claim, was privileged, and there was no evidence of malice, and that portion of the plaintiff's claim should be dismissed and taken from the jury."

The appeal is based upon the ruling on the first occasion, it being claimed that this occasion is equally privileged—the privilege claimed is not absolute but qualified.

The facts are simple—the defendant, having, as he says, heard some rumours without taking the trouble to investigate them, told one Nelson plainly that "Mrs. Knapp had taken her children to

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App. Div. William Ritchie's and had come out of the gate and met William  
 1926. Orvis and that she went with him to her home in his car and  
 remained there with him until two or three o'clock in the morning."  
 KNAPP For the defendant it is said that both he and Nelson and the  
 v. Reverend William Orvis are members of the same religious body,  
 McLEOD. and that he thought it his duty to tell Nelson the rumours he had  
 Riddell, heard for the good of their community, in which all three had an  
 J.A. interest.

The rule as to qualified privilege seems to be becoming enlarged in the English Courts: *C. v. D.* (1924), 56 O.L.R. 209, at p. 213; and we should not strive to limit it unduly. I find it unnecessary to decide whether the occasion was one of qualified privilege as regards Orvis. I assume that it was. But the real question is not *quoad* Orvis but *quoad* the plaintiff.

And we are not to be influenced by the fact that she is a woman—*nobis dicere non dare*. So far from the woman being favoured in the Common Law—which is our law except as modified by statute—the reverse is the case: *French v. Smith* (1922), 53 O.L.R. 31, at p. 33. Only now is the law being put in fairly reasonable condition.

The plaintiff must be content with the same law as would be applied to a man—and that though a slander of this kind would probably injure her much more seriously than one of the other sex.

The rule as to qualified privilege seems to arise from the conception that, slander being an action on the case, malice was the gist of it: the mere fact of publishing a false statement *primâ facie* shewed malice; but, if this publication were from a legal or moral duty, the *primâ facie* presumption was rebutted—and to succeed malice must be proved: *Davies v. Snead*, L.R. 5 Q.B. 608, at p. 611.

Whatever the historical and technical reasons, the rules are well established; and the only question is as to their application to the present case.

How far one making a statement concerning another could set up privilege in making the same or a similar statement concerning a third person has been considered in several cases.

In *Miller v. Johnston* (1874), 23 U.C.C.P. 580, it was held that an employer could not claim privilege when, after discharging a servant for stealing, he said to the servant's father, who inquired as to the reason, that he and all his family were thieves.

*Manby v. Witt* (1856), 18 C.B. 544, does not help much—there, two servants, being dismissed, each separately asked the reason and each was told by the defendant that they two had been robbing him. Jervis, C.J., said (pp. 546, 547), "When asked by the cook his reasons for dismissing her, he was bound to tell her the whole

charge"—the charge was that the footman was giving away provisions given him by the cook for that purpose. Here there were two conspirators, and to each inquiring the whole charge was necessarily told.

In *Davies v. Snead*, L.R. 5 Q.B. 608, the defendant mentioned to her rector a rumour she had heard, "Your and your scoundrel solicitor's names are ringing through the shops and streets . . . You are spoken of as robbing the widow and orphan—you to build your church, and he to marry his daughter." The solicitor brought an action for slander.

Lush, J., p. 609: "The statement is not divisible. How could the defendant recount what was said about Harris without including what was said of the plaintiff?"

Mellor, J., I think, applies the proper test when he says on p. 612: "It was contended that the privilege would not include her mention of the plaintiff, but I think that was answered by saying that it was impossible to exclude the reference to the plaintiff and yet tell Mr. Harris (the rector) the slanders against him."

Lush, J., at p. 613, says: "I think . . . that it is impossible to sever the part of the statement relating to Mr. Harris from that relating to the plaintiff."

*Etchison v. Pergerson* (1891), 88 Ga. 620, is a case of a church trial, where it was necessary to disclose the full facts, which included the name of an alleged accomplice in adultery.

How far statements concerning third parties are privileged is somewhat discussed in *Merchants Insurance Co. v. Buckner* (1899), 98 Fed. Repr. 222; but the defendant can receive no advantage from anything there decided. Nor can he receive any assistance from *Nevill v. Fine Arts and General Insurance Co.*, [1895] 2 Q.B. 156, *per* Lord Esher, M.R., at p. 170.

We need not consider what would be the rule if the statement had been made in a Church trial or directly to the Minister that he might protect his good name or be guarded in his associations. Here there was no need to mention the plaintiff's name at all—the complaint was as to the unchastity of the pastor, and that would be as objectionable with any other woman.

I am not deciding that the rule in *Manby v. Witt* and *Davies v. Snead* is applicable to afford a privilege except where the slanderous statement is made to one of the persons involved—but that, even applying that rule, it does not cover the present case.

I would dismiss the appeal with costs.

*Appeal allowed* (LATCHFORD, C.J., and RIDDELL, J.A., dissenting.)

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## [APPELLATE DIVISION.]

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MARTIN V. CLARKSON.

April 16.

*Bankruptcy—Company—Issue of Debentures—Failure to File Prospectus or Statement in Lieu thereof—Ontario Companies Act, secs. 101, 102—Effect of—Company Setting up its own Default—Rescission of Debentures — Equitable Condition — Restitution of Money Paid—Judgment for Enforcement of Charge—Right of Trustee in Bankruptcy to Open up.*

The judgment of WRIGHT, J., 57 O.L.R. 499, was affirmed.

*Held*, that it was not *ultra vires* of the company to issue debentures secured upon its assets and undertaking; but in exercising the power it failed to comply with a provision of the law (secs. 101 and 102 of the Ontario Companies Act, requiring the filing of a prospectus or a statement in lieu thereof); and, setting up its own default, it now sought to set aside the debentures upon which B. in good faith advanced his money: the only basis upon which it could succeed (allowing that the debentures were subject to rescission upon the grounds alleged) was that of complete restitution, that is, repayment of the moneys advanced and interest.

*Zimmerman v. Trustee of Andrew Motherwell of Canada Ltd.*, [1925] 3 D.L.R. 953 (P.C.), applied and followed.

*Semble*, per LATCHFORD, C.J., and ORDE, J.A., that the effect of secs. 101 and 102 is merely to render contracts to take shares or debentures voidable at the option of the subscriber.

*Also*, that in a proper case a trustee in bankruptcy may open up a judgment upon grounds other than fraud or collusion.

APPEAL by the plaintiff from the judgment of WRIGHT, J., 57 O.L.R. 499.

March 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, JJ.A.

*F. H. Phippen*, K.C., and *J. A. McEvoy*, for the appellant, argued that the debentures were invalid because of the failure of the company to file a prospectus or a statement in lieu thereof in accordance with the provisions of secs. 101 and 102 of the Ontario Companies Act, R.S.O. 1914, ch. 178: *In re Blair Open Hearth Furnace Co. Ltd.*, [1914] 1 Ch. 390; *In re Jubilee Cotton Mills Ltd.*, [1922] 1 Ch. 100, at p. 118, [1923] 1 Ch. 1; *S.C.*, *sub nom. Jubilee Cotton Mills Ltd. (Official Receiver and Liquidator) v. Lewis*, [1924] A.C. 958; *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629; *Premier Trust Co. v. Raymond* (1922), 52 O.L.R. 533; *Re Bluebird Corporation Ltd.* (1926), *ante* 486. It was *ultra vires* of the company to issue securities before filing a prospectus or a statement in lieu thereof; and there could be no estoppel against the company in connection with these securities, because one cannot estop a com-

pany in connection with something which it cannot do. It was the duty of persons dealing with the company to see that the company had power to do what it purported to do. They should ascertain whether a prospectus was filed. Nothing the company could do—for instance, consent to a judgment—would validate these securities. And so the judgment of July, 1924, was waste paper so far as the appellant was concerned. He was not a party to that judgment, and so there was no estoppel against him.

A. J. Thomson, for the defendant the Bank of Nova Scotia, and A. B. Mortimer, for the defendant Clarkson, respondent, contended that the statute had been passed for the protection of investors, and was not intended to invalidate securities in the hands of investors. Neither the company nor its assignee could set up the company's own default by way of repudiation of its liabilities upon debentures delivered to a purchaser in good faith and for valuable consideration. Where an equitable remedy is asked, equity must be done by the applicant. It was not *ultra vires* of the company to issue the debentures. The debentures were valid. As to estoppel by the judgment referred to, the trustee in bankruptcy was in no higher position than the company; and so was estopped from contesting the validity of the debentures. Counsel also argued that there was nothing in the Act declaring that the filing of the prospectus would be notice to those dealing with the company so as to compel them to search for their own protection. The filing was a matter of internal management, about which the investor need not concern himself.

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April 16. ORDE, J.A.:—The special case which was before Wright, J., under Rule 126, submitted the following questions for the opinion of the Court:—

(a) Is the plaintiff estopped by the judgment of the 24th July, 1924, from contesting the validity of the debentures issued by the company?

(b) If the plaintiff is not so estopped, were the said debentures valid in the hands of the said Arthur Hamilton Britton?

(c) If not valid in his hands, are the said debentures valid in the hands of the Bank of Nova Scotia as pledgees as aforesaid?

All these questions were answered by the learned Judge in the affirmative, and the plaintiff, as trustee in bankruptcy of the company, now appeals.

It is plain, of course, that an affirmative answer to any of the three questions is sufficient to uphold a judgment in favour of the respondents. And, as I have grave doubt upon the question as to whether or not the trustee in bankruptcy is estopped by the judg-



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ment of the 24th July, 1924, in the debenture-holders' action, for reasons which I will express later, I prefer to deal first with the question of the validity of the debentures themselves, involved in questions (b) and (c).

The plaintiff contends that the debentures are invalid and not binding upon the company because of the failure of the company to file a prospectus or a statement in lieu thereof, in accordance with the provisions of secs. 101 and 102 of the Ontario Companies Act, R.S.O. 1914, ch. 178. Those sections are as follows:—

“101.—(1) Every public company before offering to the public for subscription shares, debentures, debenture stock or other securities shall issue a prospectus as hereinafter set out.

“(2) All purchases, subscriptions or other acquisitions of shares, debentures, debenture stock or other securities of any company required to file a prospectus or statement in lieu of a prospectus, shall be deemed, as against the company and the signatories to the prospectus or statement, to be induced by such prospectus or statement, any term, proviso or condition thereof to the contrary notwithstanding.

“(3) A subscription for shares, debentures or debenture stock shall not be binding on the subscriber unless at or before the subscription there is delivered to him a copy of the prospectus, if any, issued by the company, or if a prospectus has not been issued a copy of the statement mentioned in section 102.

“(4) The subscriber to be entitled to the benefit of subsection 3 must elect to withdraw his subscription before or within ten days after notice of the allotment to him of the shares, debentures or debenture stock for which he has subscribed.

“102.—(1) A company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares, debentures or debenture stock unless, before the first allotment, there has been filed with the Provincial Secretary, in lieu of a prospectus, a statement, Form 5, signed by every person who is named therein as a director, or proposed director of the company or by his agent authorised in writing.

“(2) This section shall not apply to a private company or to shares subscribed for by the petitioners for the Letters Patent before the issue thereof.”

In support of his contention he relies upon the dicta of several Judges in *In re Blair Open Hearth Furnace Co. Ltd.*, [1914] 1 Ch. 390; in *In re Jubilee Cotton Mills Ltd.*, [1922] 1 Ch. 100, [1923] 1 Ch. 1, and in the House of Lords, *Jubilee Cotton Mills Ltd. (Official Receiver and Liquidator) v. Lewis*, [1924] A.C. 958; in the judgment of Middleton, J., in *Premier Trust Co. v. Ray-*

mond, 52 O.L.R. 533; and the recent judgment of this Court in *Re Bluebird Corporation Ltd.*, ante 486.

In none of these cases, except the *Raymond* case, did the simple question whether or not a company, either itself or through its liquidator or trustee in bankruptcy, could effectively set up its own default by way of repudiation of its liability upon debentures actually issued and delivered to a purchaser thereof in good faith, come squarely before the Court. The *Blair Open Hearth* case involved the right of a subscriber to have his name removed from the share-register merely because of certain inaccurate statements in the statement filed in lieu of a prospectus. In the *Jubilee Cotton* case, while the validity of the debenture issue, as well as the allotment of shares, was in issue, the real question was whether or not a promoter of the company, to whom the shares and debentures had been issued, was obliged to account for profits improperly made while in a fiduciary position.

The *Bluebird Corporation* case involved the right of the trustee in bankruptcy to place certain subscribers for shares upon the list of contributories.

In *Premier Trust Co. v. Raymond*, Middleton, J., held that a mortgage given to secure debentures by a company which had failed to comply with secs. 101 and 102 was void, upon the strength of the dicta in the *Blair Open Hearth* and the *Jubilee Cotton* cases, but it is a fair inference from his judgment that he did so with some hesitation, and in the belief that the question would be dealt with more satisfactorily by a higher Court. It was assumed by counsel apparently that no prospectus or statement in lieu thereof had been filed, and the judgment of Middleton, J., was based upon that assumption. When it was discovered that this assumption was wrong, the Appellate Division was not called upon to deal with the question of validity, but granted a new trial: *Premier Trust Co. v. Raymond* (1923), 55 O.L.R. 30. The judgment in the *Raymond* case can hardly be regarded as a considered judgment even by a single Judge, upon a question of such importance as that involved here.

I find it extremely difficult to read secs. 101 and 102 otherwise than as rendering contracts to take shares or debentures voidable at the option of the subscriber. The object of the legislation is the protection of the subscriber and not that of the company. The language used in the two sections is significant. In sec. 101 it is, "Every public company before offering to the public for subscription . . . shall issue a prospectus," and in sec. 102 it is, "A company which does not issue a prospectus . . . shall not allot any of its shares, debentures," etc. In the case of debentures there

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is, in my judgment, a wide difference between a contract to purchase a debenture when it is sought either by the company or by the subscriber to enforce it, and the obligation embodied in the debenture itself where both the purchaser and the company have raised no objection, and the purchaser has paid the consideration and received the debenture. One would have supposed that if the Legislature had intended to render the company powerless to issue shares or debentures in the absence of a prospectus or statement in lieu thereof, the word "issue," and not the word "allot," would have been used in sec. 102.

I do not think, however, that any useful purpose will be served by an elaborate analysis of the two sections with a view to distinguishing the questions involved here from the dicta of the learned Judges in the two English cases which have given this Court so much concern. The debentures having been in fact delivered to Britton for an adequate consideration, the case really falls to be determined upon a very simple ground.

It was in no sense *ultra vires* of the company to issue debentures secured upon its assets and undertaking. It was clothed with ample corporate power to do so. But in exercising the power it failed to comply with a provision of the law, and it now says, through its trustee in bankruptcy, that that failure so tied its hands as to render the debentures invalid, and the trustee now seeks their rescission on that ground.

With what result? Had the company exceeded its corporate powers in borrowing from Britton, the utmost that the trustee could secure by attacking the debentures would be to drive the lender back upon his equitable right to stand in the shoes of the creditors whose debts had been paid with his moneys, upon the equitable principle of subrogation, for which *Baroness Wenlock v. River Dee Co.* (1887), 19 Q.B.D. 155, is usually quoted.

That case was a typical application of the principle that he who seeks the intervention of a Court of Equity to set aside a transaction must himself do equity. Here the company setting up its own default seeks to set aside the debentures upon which Britton in good faith advanced his moneys. The only basis upon which it can succeed (allowing for the sake of argument that the debentures are subject to rescission upon the grounds alleged) is that of complete restitution to the debenture-holders, in other words payment of the moneys advanced by Britton and interest. Where a mortgage given by a company to secure moneys advanced is based upon an invalid by-law, the only remedy which the company or its trustee in bankruptcy has is by way of rescission, and such rescission will only be directed "on the equitable condition



of repayment" of the moneys advanced. Such was the judgment of the Privy Council in the recent case of *Zimmerman v. Trustee of Andrew Motherwell of Canada Ltd.*, [1925] 3 D.L.R. 953. The principle enunciated in that judgment is as applicable to an issue of debentures as to a mortgage, and is, I think, sufficient to meet all the objections which have been urged by the appellant against the validity of the debentures.

For these reasons, I am of the opinion that the debentures must be deemed to be valid securities in the hands of Britton, or of the Bank of Nova Scotia, and that the affirmative answers of Wright, J., to questions (b) and (c) must be affirmed.

It is really not necessary to deal with question (a), as to whether or not the judgment of the 24th July, 1924, operates as an estoppel as against the company's trustee in bankruptcy; but, lest our affirmance of the judgment appealed from may be interpreted as a complete assent to the answer of the learned Judge to question (a), I desire to point out that there may be cases where a trustee in bankruptcy may open up the judgment upon grounds other than fraud or collusion. The powers exercised by Courts of Bankruptcy in requiring judgment creditors to prove the consideration for their judgments have been very wide; Williams on Bankruptcy, 12th ed., p. 145. See for example *In re Van Laun*, *Ex p. Chatterton*, [1907] 2 K.B. 23.

The appeal must be dismissed with costs.

LATCHFORD, C.J., agreed with ORDE, J.A.

RIDDELL, J.A., agreed that the appeal should be dismissed with costs.

MIDDLETON, J.A.:—This appeal should, in my opinion, be dismissed, upon the simple ground that the making of the debentures was not a thing *per se ultra vires* of the company, and the Court should not sanction any proceeding to set aside the debentures actually issued, at the instance of the company or its assignee, save upon the equitable condition of the repayment of the sum advanced. This is justified by the decision of the Privy Council in *Zimmerman v. Trustee of Andrew Motherwell of Canada Ltd.*, [1925] 3 D.L.R. 953.

The difficulty in arriving at a satisfactory conclusion upon the matters discussed in the Court below, and upon the argument, arises mainly from dicta in earlier cases when these were in no sense material to the matters then in hand, and it seems to me very inexpedient to contribute further to the confusion existing by now discussing matters we are not called upon to decide.

*Appeal dismissed with costs.*

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RE OAKES AND TOWNSHIP OF STAMFORD.

April 16.

*Assessment and Taxes—Exemption—Assessment Act, sec. 39 (7 Geo. V. ch. 45, sec. 7)—Tenant Occupying Land of Crown in an Official Capacity under the Crown—Gardener Employed by Queen Victoria Niagara Falls Park Commissioners.*

The Queen Victoria Niagara Falls Park, which is vested in a Board of Commissioners under the authority of the Queen Victoria Niagara Falls Park Act, R.S.O. 1914, ch. 50, is "land owned by the Crown," within the meaning of the Assessment Act, sec. 39, as enacted by 7 Geo. V. ch. 45, sec. 7.

*Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, applied and followed.

Lands forming a part of the park, which O., employed by the Commissioners as chief gardener, was compelled to occupy in that capacity, were held to be occupied by him "in an official capacity under the Crown," within the meaning of the exempting words of sec. 39.

*Re Town of Cochrane and Cowan* (1921), 50 O.L.R. 169, and *Re Town of Cochrane and King* (1925), 56 O.L.R. 477, distinguished.

APPEAL by John Oakes, upon a case stated by the Judge of the County Court of the County of Welland, pursuant to the provisions of sec. 81 of the Assessment Act, from the decision of the Judge that Oakes was not exempt from taxation in respect of a house and land occupied by him.

March 29. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*H. H. Davis*, for the appellant, argued that he occupied the house and land for which he was assessed, in an official capacity under the Crown, and so came within the exception mentioned in sec. 39 of the Assessment Act, as enacted in 1917 by 7 Geo. V. ch. 45, sec. 7, and was therefore exempt from taxation in respect of the property. The appellant on the facts disclosed by the evidence was compelled to occupy the property in his capacity as chief gardener of the Queen Victoria Niagara Falls Park, and his right to occupy was limited to his term of service. It was not a case of personal convenience but one of compulsion. He was not there in the exercise of any right of occupation; he had no tenure or right of occupation at all. He was there in pursuance of his duty: *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, where it is said that the Commission is an emanation from the Crown. The Commissioners hold the land as trustees for the Province of Ontario. The appellant therefore occupies the property in an official capacity under the Crown, being an employee of the Commission. On the facts, counsel distin-

guished *Re Town of Cochrane and Cowan* (1921), 50 O.L.R. 169, and *Re Town of Cochrane and King* (1925), 56 O.L.R. 477. The *Cowan* case was referred to in the Privy Council in *City of Montreal v. Attorney-General for Canada*, [1923] A.C. 136, at p. 143.

*E. A. Harris*, for the township corporation, respondents, contended that there must be some degrees of duty, and a man who is a gardener in a public park cannot be regarded as an official of the Crown, and so cannot claim exemption for Crown property occupied by him in an official capacity under the Crown. The exemption granted by the statute was not intended to cover menial servants. The tenant had not discharged the onus of shewing that he came within the exception.

*Davis*, in reply, referred to the definition of "tenant" in sec. 2(1) of the Assessment Act. That definition involved a right of occupation, and not a mere license or permission in the discharge of one's official duty.

April 16. The judgment of the Court was read by MIDDLETON, J.A.:—A case stated by his Honour Judge Livingstone, Judge of the County Court of the County of Welland, pursuant to the provisions of sec. 81 of the Assessment Act.

John Oakes is assessed as tenant in respect of certain lands occupied by him and a residence thereon. The lands form part of the Queen Victoria Niagara Falls Park, vested in a Board of Commissioners under the authority of the Queen Victoria Niagara Falls Park Act, R.S.O. 1914, ch. 50. Oakes is employed by the Commission as chief gardener, and "he is compelled to occupy the residence in his capacity as chief gardener and his right to occupy is limited to his term of service. The residence and plot of land is not fenced and adjoins the greenhouses, which are under the direct control of the gardener, and are part of the Park."

By the Assessment Act, R.S.O. 1914, ch. 195, sec. 39, as enacted in 1917 by 7 Geo. V. ch. 45, sec. 7, it is provided: "The tenant of any land owned by the Crown (except a tenant occupying the same in an official capacity under the Crown) . . . shall be assessed . . ."

Two questions arise upon the appeal: first, is this land owned by the Crown within the meaning of this statute? and, secondly, does Oakes occupy the same in an official capacity under the Crown within the meaning of the statute?

The learned County Court Judge has held that Oakes is liable to be assessed, basing his decision upon a negative answer to the second question.

In my opinion, the learned County Court Judge was quite right

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1926 meaning of the statute. The Park Commissioners are an emanation from the Crown, or agents of the Crown, and, although the  
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Middleton, J.A. I am, however, unable to agree with the learned County Court Judge in his view that Oakes is not a tenant occupying this residence in an official capacity under the Crown. It is, I think, safer to rely upon the exact words of the statute than to attempt to find any analogy between our Assessment Act and the English Poor Law. A reference to the English statute demonstrates how widely different the wording of the statute is, and the questions which arise under these statutes throw little light upon the true construction of our statute, in which the Legislature has crystallised for us the principle to be applied. It may be that it does not widely differ from the rule which was thought to have been established by Day, J., in *Showers v. Assessment Committee of Chelmsford Union*, [1891] 1 Q.B. 339, 343, that "living accommodation provided for a person who is required to be there as part of the service of the Crown does not impose upon that person a liability to be rated;" but it is, I think, clear, upon the facts found by the learned Judge that I have quoted above, that Oakes does occupy the premises in his official capacity of gardener in the service of the Crown. Under the English cases the question of payment of rent or deduction of rent from wages has been made a factor. Under our statute this does not appear to be of importance.

I do not think that this case in any way conflicts with the decisions in *Re Town of Cochrane and Cowan*, 50 O.L.R. 169, and *Re Town of Cochrane and King*, 56 O.L.R. 477. In the former persons occupying houses owned by the railway operated by the Crown were held not to be exempt under the statute because it was not compulsory for them to occupy the residences there in question, and the tenant was permitted to occupy for his personal convenience. In the latter case the station-agent was not exempt because he was "not bound by contract to occupy them nor required by command or regulation to do so." In this case the finding of the learned County Court Judge, upon undisputed evidence, is that the appellant was "compelled to occupy the residence in his capacity as chief gardener."

The appeal should, therefore, be allowed and the questions submitted, "Was I right in holding (a) that the appellant was not occupying his residence in an official capacity under the Crown,



and (b) that he was not exempt from taxation for such residence?" should be both answered in the negative. The appellant should have his costs throughout.

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*Appeal allowed.*

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[APPELLATE DIVISION.]

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*Vendor and Purchaser—Agreement for Sale of Land—Purchaser in Possession—Covenant to Build House—Right to Cut Timber Limited to Cutting for that Purpose—Purchaser Forbidden by Vendor to Cut—Purchaser not Bound to Obey—Cause of Action—Absence of Actual Physical Interference—License to Draw Water from Vendor's Land—Revocation—Reasonable Notice—Sufficient Time to Procure Water from another Source.*

Under an agreement for the purchase and sale of land the purchaser took possession. In the agreement the purchaser covenanted to erect a frame dwelling on the land before a certain date, and the agreement provided that he should be entitled to cut standing timber "for the purpose only of using same in erecting . . . or repairing buildings on the said lands." He built the house, using some trees from the land for that purpose. Then, requiring some flooring for the house, he cut down a tree. The vendor forbade him to take out logs or cut another tree, and he desisted accordingly:—

*Held*, that the purchaser, acting in good faith, had the right to take standing trees to complete the building, and the vendor had no right to prevent him; but the purchaser had no cause of action—a wrongful claim to the control of property, unaccompanied by an act of interference, does not give a cause of action for damages.

There was no well on the land, and there was nothing about water in the agreement. The purchaser alleged that the vendor agreed to allow water for domestic use and for watering horses to be drawn from his (the vendor's land), and in fact the purchaser got his water in that way for some months, but the vendor refused to allow him to continue to do so:—

*Held*, that the permission to use the water was a license, and was revocable at will.

*Naegele v. Oke* (1916), 37 O.L.R. 61, followed.

But the license was revocable only on reasonable notice.

Review of the authorities. *Lowe v. Adams*, [1901] 2 Ch. 598, specially referred to.

What is a reasonable time depends upon the purpose for which time is needed—in this case to procure water from another source.

A notice on a Tuesday for the following Friday was considered reasonable.

AN appeal by the defendant from the judgment of the County Court of the County of Brant.

The following statement of the facts is taken from the judgment of RIDDELL, J.A.:—



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The defendant, being the owner of a farm in the township of Brantford, entered into an agreement with the plaintiff to sell it to him; and a written agreement dated the 21st December, 1922, was signed by both parties—the price being \$11,000, \$500 down, the remainder in half-yearly instalments of \$25 each, etc. The purchaser covenants to erect a frame dwelling on the lands before the 1st June, 1923—to be entitled to use dead and down timber for firewood and to cut standing timber “for the purpose only of using same in erecting buildings or repairing buildings on the said lands.”

The agreement is skilfully and carefully drawn; but the plaintiff contends that “contemporaneously with the execution of said agreement dated 21st December, 1922, and as an inducement to the plaintiff to enter into said agreement, the defendant agreed with the plaintiff that the plaintiff should be allowed to use water from the well on the premises belonging to and occupied by the defendant, so long as the plaintiff required to do so for domestic use and for his horses.”

This is denied by the defendant, whose evidence is as follows:—

“Well, I just gave him water the same as any other man would give him. He asked about water, and when the agreement was drawn he said, ‘I am going to put a well down in the spring and I have an interest in a drilling outfit,’ and finally in the spring he asked me if he could have water.

“Q. In 1923 spring came, and had he put the well down? A. No. He said he would put it down and that he had a drilling outfit and it would not take him long to put it down, and then spring came along and he said could he have some water and I said yes.”

Nothing about water is to be found in the written agreement, and the plaintiff claims that it was a collateral contemporaneous agreement.

The plaintiff entered into possession of the farm on the 15th March, and built the house, using some trees from the farm for the purpose. He says that he required some flooring for the house, and early in January went to the bush and cut down a tree to get the logs to make flooring material; that the defendant, when told of this, forbade him taking out the logs, as he was in arrears in his interest—his story reads:—

“I told Riddle I had started cutting logs, and he said, ‘I don’t know as you are going to cut them.’

“Q. Where did this take place? A. At Mr. Riddle’s own place.

“Q. He is just across the road? A. Yes.

“Q. Yes? A. I said, ‘How is that?’ and he said, ‘You are in arrears in your interest, and I am not going to have trees taken

off.' I said, 'The lumber is all in the house. You have it there, and now you refuse me taking the logs out.' He said, 'That does not make any difference, you are not going to take any logs out now; you are not going to take that out'—and the logs I cut is there now.

"Q. And in consequence of him notifying you in that way, you did stop? A. Yes."

He says that he had to buy the flooring at the price of \$158 (or more).

Paying up the arrears in September, the plaintiff had an interview with the defendant of which he gives the following account:—

"I told him I was going to cut logs and take them out, and I said, 'I am not in arrears now.' He says, 'You are not going to cut another tree in that bush for anybody.' He says, 'Don't you touch another tree, I am not going to have one tree cut.'"

In consequence of this prohibition the plaintiff did not cut any more trees.

That is one of the two grounds of action. The other is based upon the alleged agreement for water. As to this the plaintiff says:—

"The first he said about water, along in the spring of 1924 he asked me not to lead the horses in on the driveway, that it made dust around the house, so I said, 'All right.' I kept the horses outside and carried the water to them; then along in June my little girl went over to get some water;

He told the child not to walk on his grass, that he would throw her out in the yard and he would not let us have water at all if she went on his grass. It went along, and there was nothing more said about water, it went along until the 23rd of September (1924).

"Q. Then what took place? A. He came over to the fence . . . and said, 'You must make some other preparations for water,' and I said, 'How is that, Mr. Riddle?' And he said, 'You have had it at my place as long as you are going to have it, and I give you notice that you are to quit on Friday.'

"Q. What day of the week was this? A. On Monday . . . I said, 'I don't know what I am going to do,' and he said, 'I cannot help that; you must get a well down or something; you cannot have any after Friday.'

"Q. What did you do after that? A. I used the water up till Friday: I got some barrels and drew water from the back end of the farm, in the bush, for my horses, and I borrowed a can, an 8-gallon milk can, off Robert Berry on the next farm, and he gave

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App. Div. me permission to get water from his well, and we carried water  
1926. from his well for the house ever since."

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For this refusal to allow the plaintiff to have water, he sues for damages. At the trial, the jury found for the plaintiff for the amount of the lumber bought and \$250 damages "for loss of time and inconvenience through the refusal of water by the defendant." His Honour the Judge of the County Court of the County of Brant, after reserving judgment, gave carefully drawn reasons and directed judgment to be entered for \$408.60 and costs. The defendant appeals. In considering this appeal I think we should take the plaintiff's story as correct and I have consequently not set out the defendant's story.

March 30. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*Ross Macdonald*, for the appellant, argued that the alleged oral term regarding the easement for water should not be considered—as there was really no such term. The written agreement contained the whole bargain, and the plaintiff had no right to add to or vary it. If the permission to use the water was an easement, it came under the Statute of Frauds. If it was a license, it could be revoked at any time. As to the wood, counsel contended that, as the appellant had no right to refuse the plaintiff permission to cut the wood, the plaintiff had no cause of action in that regard. He should not have allowed the appellant to "bluff" him.

*E. R. Read*, for the plaintiff, respondent, contended that the appellant's prevention of the respondent cutting wood gave the respondent a cause of action. On the question of the use of the well, this being a license, the respondent was at least entitled to reasonable notice of revocation, and such notice had not been given: *Winter v. Brockwell* (1807) 8 East 308; *Taylor v. Waters* (1817), 7 Taunt. 374.

*Macdonald*, in reply, contended that sufficient notice had been given of revocation of the license to take water.

April 16. The judgment of the Court was read by RIDDELL, J.A. (after setting out the facts as above):—As to the first cause of action, unless it could be shewn that the plaintiff was acting in bad faith, he had the right to take standing trees to build the house, and the defendant had no right to prevent him.

The plaintiff was in possession of the trees as part of the land under an agreement to purchase, but limited as to his use of them—the defendant, it may be admitted, forbade him verbally to use



the trees of which he was so in possession in that way. I am wholly unable to see how this can be considered any more a cause of action than if a third person had forbidden him. It is not unlike the case of a tenant or purchaser with a covenant for quiet enjoyment: in such a case the interference to be actionable must be "actual physical interference . . . as distinguished from a metaphysical interference:" Redman on Landlord and Tenant, 8th ed., p. 259. So in *Ball v. Carlin* (1908) 11 O.W.R. 814, at pp. 816, 817, I decided that notice to quit was not such an interference; and this was approved in a case in the Chancery Division (in which I sat *ad hoc*). See also *Re Broom and Godwin* (1910), 2 O.W.N. 125. It has never, I think, been considered that a wrongful claim, unaccompanied by an act, to the control of property, constitutes a cause of action for damages. It may, indeed, in some cases, afford a basis for an action for a declaration.

I do not press the point that the plaintiff, if he refrained from cutting down trees, still has them.

As to the water, in addition to the difficulty in the plaintiff's way arising from the Statute of Frauds, he has the peculiar law of license to face.

Admittedly, if the permission to use water on the defendant's premises was an easement, the Statute of Frauds is a complete bar. Mr. Read, however, argues that it is a license, and I agree with him. We have recently considered the law of license in a case not unlike the present, and said that such a license is revocable at will—it is therefore unnecessary to cite other authorities: *Naegele v. Oke* (1916), 37 O.L.R. 61.

It is argued, however, that reasonable notice was necessary before the license could be revoked—the authorities say unequivocally that "a licensee whose license is revoked is entitled to reasonable notice of the revocation:" Gale on Easements, 10th ed., p. 62.

The doctrine seems to have begun with *Web v. Paternoster* (17 Jac., 1619), Palmer 71, Popham 151, 2 Rolle Rep. 152, an action of trespass. Palmer—whose report is said by Lord Ellenborough, C.J., in *Winter v. Brockwell*, 8 East 308, at p. 310, to be the best—says (I translate):—

"Sir Will. Plumer gave a license to Web to put a cock of hay upon Black Acre until he could conveniently sell it, and afterwards leased to Paternoster for years, who without any notice to Web put his cattle in that Acre, who devoured the cock of hay, upon which Web brought this action . . ." The Court, Montague, C.J., Haughton and Dodderidge, JJ., decided that "A

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1926. it is executory, and here it was executed."

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This terminology is a little misleading: the remainder of the judgment shews that what is meant is that a merely executory license may be countermanded without notice, but an executed license may be countermanded only with reasonable notice. In this case the plaintiff failed because he "*ad un convenient temps, qual est intermit*," had a reasonable time which is past—in other words had reasonable notice. The reports in Popham and Rolle both add something to what is said in Palmer but nothing of importance for the present purpose.

Then came *Winter v. Brockwell*, 8 East 308, in which a parol license had been given to put a skylight over the defendant's area: the plaintiff, after it was finished, objected to it, and, after giving notice to have it removed, brought an action on the case—it was held that a license having been given to do a certain thing and acted upon, "the other should (not) be permitted to recall his license and treat the first as a trespasser for having done that very act"—the learned Chief Justice said in his remarks at the trial, "at least not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred."

*Taylor v. Waters*, Taunt. 374, in which, however, the license was held to be irrevocable, need not be further considered except to say that *Wood v. Leadbitter* (1845), 13 M. & W. 838, should be read in any discussion of the case.

Coming down to more modern times: in *Cornish v. Stubbs* (1870), L.R. 5 C.P. 334, A. allowed B. to stack timber upon a wharf adjoining the premises let by A. to him, and the rent was paid partly in respect of this privilege—the Court held (p. 338, *per* Bovill, C.J.): "It seems almost necessary, from the nature of the license, that the plaintiff should have had a right to a reasonable time to remove his goods"—(p. 339, *per* Willes, J.): "Under a parol license the licensee has a right to a reasonable time to go off the land after it has been withdrawn before he can be forcibly thrust off it." Montague Smith, J., concurred.

So in *Mellor v. Watkins* (1874), L.R. 9 Q.B. 400, Cockburn, C.J., at p. 405, says:—

"On the other point, principle, reason, and common sense alike require, that although a license may be revocable at any moment, the licensee should have a reasonable time for removing off the premises what he has been licensed to put upon them; and the judgment of the Court of Common Pleas in *Cornish v. Stubbs* fully upholds that proposition."

Blackburn, J., at p. 405, says:—

“On the other point, it seems but reasonable that the person giving the license, though revocable at any time, must give the licensee sufficient time to remove the articles from the premises; and, at all events, that he is bound to give the licensee reasonable notice; none whatever appears to have been given here. I am happy to find that this position has already been established by the case of *Cornish v. Stubbs*, in which the judgment of Willes, J., goes most fully into the principle, and is amply sufficient to govern the present case.”

Lush, J., concurred.

In *Aldin v. Latimer Clark Muirhead & Co.*, [1894] 2 Ch. 437, a lessee, by license of his lessor, built ventilators in the walls of a building: and the Court held that he was entitled to reasonable notice before the lessor could interfere with them—citing *Hewlins v. Shippam* (1826), 5 B. & C. 221, 226; *Cocker v. Cowper* (1834), 1 C. M. & R. 418; and *Mellor v. Watkins*, *supra*.

In *Wilson v. Tavener*, [1901] 1 Ch. 578, by an agreement in writing the defendant agreed to allow the plaintiff to erect a hoarding upon the front of a cottage and use the gable end for a bill-posting station, at a yearly rental—this was construed as a license revocable at will on reasonable notice.

Cases in which something has been placed by building or otherwise on the premises of another by his license, and thus the license has become executed and is no longer executory, do not help us much in the present inquiry.

One may without notice cut off overhanging branches if that does not involve trespassing on a neighbour's property: *Lemmon v. Webb*, [1894] 3 Ch. 1, [1895] A.C. 1.

Perhaps the nearest to our case is *Lowe v. Adams*, [1901] 2 Ch. 598, in which a license to shoot pheasants enjoyed from year to year was considered terminable on reasonable notice.

It would, therefore, seem that it is the law that a license such as that in question in this case is revocable only on reasonable notice.

In *Web v. Paternoster*, Palmer 71, at p. 73, Haughton, J., said: “The Court should decide what is a reasonable time and what not: for the country is not the judge of that but the law”—and “*sur ceo point tout le Court agree.*”

What is a reasonable time must depend upon the purpose for which the time is needed—and in the present case the time is needed to procure water from some other source. Says the plaintiff:—

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"I asked him what I was going to do. I said, 'I haven't got any water and you promised to let me have water, what am I going to do? He said, 'I can't help that'—that I must get a way to get it."

The notice was on Tuesday for Friday. The plaintiff had plenty of time to make arrangements to procure water elsewhere. As he himself says:—

"I used the water up till Friday; I got some barrels and drew water from the back end of the farm, in the bush, for my horses, and I borrowed a can, an 8-gallon milk can, off Robert Berry on the next farm, and he gave me permission to get water from his well, and we carried water from his well for the house ever since."

Whether it be a question of law or of fact, the time in which the plaintiff without unusual effort was able to obtain a supply of water must be considered a reasonable time. I am unable to see that the plaintiff has made out a case. The appeal should be allowed and the action dismissed, both with costs.

*Appeal allowed.*

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[APPELLATE DIVISION.]

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REX v. TRESEGNE.

April 16.

*Criminal Law—Assault Causing "Actual Bodily Harm"—Charge not Triable Summarily without Consent of Accused—Whether Preliminary Statement Required by sec. 778(2) of Criminal Code Made by Magistrate—Record of Proceedings—Presumption—Consent to Summary Trial—Substantial Compliance with Statute—Jurisdiction of Magistrate—Secs. 295, 773, 777(1), and 778(3) of Code.*

The defendant was convicted by a police magistrate of an assault causing actual bodily harm. The charge was not one upon which the defendant could be tried summarily without his consent: secs. 773 and 777(1) of the Criminal Code. It was said that the statement prescribed by sec. 778(2) of the Code was not made to the defendant by the magistrate, and the magistrate's record of the proceedings did not shew that it was made:—

*Held*, that, as the record was obviously incomplete, and as the prisoner was represented by counsel, who elected "to be tried summarily" and pleaded not guilty, it might be presumed that the statement was made by the magistrate; there was a substantial compliance with the statute; and an appeal from the conviction on the ground that the magistrate had no jurisdiction, by reason of the absence of the statement, was dismissed.

*Rex v. Mali* (1912), 1 D.L.R. 256, referred to.

*Rex v. Ogonosky and Barrie* (1925), 28 O.W.N. 189, distinguished.

"Actual bodily harm," in sec. 295 of the Code, means little if anything more than "battery."

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APPEAL by the defendant from his conviction by one of the Police Magistrates for the City of Toronto for assaulting and beating one Rosa Kemp, causing her actual bodily harm, and (by leave) from the sentence imposed by the magistrate, viz., 12 months' imprisonment and imprisonment for an indeterminate period thereafter not to exceed 12 months less one day.

March 31. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*J. R. Cartwright*, for the appellant, argued that the warning prescribed by sec. 778(2) of the Criminal Code was not given by the magistrate to the accused; and that, as the magistrate's jurisdiction to try the accused depended on the latter's consent after warning, the conviction should be set aside: *Rex v. Ogonosky and Barrie* (1925), 28 O.W.N. 189; *Rex v. Walsh and Lamont* (1904), 7 O.L.R. 149; Tremear's Criminal Code, p. 1094; *Rex v. Howell* (1910), 16 Can. Crim. Cas. 178; *Rex v. Crooks* (1911), 19 Can. Crim. Cas. 150. Even the consent of counsel was not sufficient to confer jurisdiction on the magistrate. Counsel also contended that there was no evidence of actual bodily harm, and that the sentence was too severe.

THE COURT called upon counsel for the Crown only on the question whether or not there had been such a warning given as the statute requires.

*Edward Bayly*, K.C., and *F. P. Brennan*, for the Crown, contended that the record of the proceedings before the magistrate was undoubtedly incomplete, and the Court might infer that the requirements of sec. 778 had been complied with. The appellant was represented by counsel, and the latter's consent to a summary trial was sufficient. The evidence shewed that a serious assault had been committed; and the sentence might well have been heavier.

April 16. The judgment of the Court was read by LATCHFORD, C.J.:—The grounds of the appeal are that the warning prescribed by sec. 778(2) of the Criminal Code was not given to the accused, and that the evidence does not disclose that any bodily harm resulted from the assault, as charged.

Section 778(2) requires that if the case is not one that can be tried summarily without the consent of the accused,



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"the magistrate shall state to the accused—

"(a) that he is charged with the offence, describing it;

"(b) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction."

The charge was not one that could be tried summarily without the consent of the accused: Criminal Code, secs. 773 and 777(1).

An affidavit has been filed in the appeal purporting to have been sworn by Tresegne, having been read over and interpreted to him, the material parts of which are as follows:—

"2. The magistrate before whom I was charged did not state to me nor did any one else state to me that I had the option to be forthwith tried by the magistrate without the intervention of a jury or to remain in custody or under bail as the court should decide, to be tried in the ordinary way by the court having criminal jurisdiction as required by section 778 of the Criminal Code, and I did not consent to be tried by the magistrate, and the magistrate had no jurisdiction to try me for the offence charged.

"3. I am an Italian by birth and do not either speak or understand English at all well and can only speak a little broken English."

It may be observed that, however limited may be the plaintiff's knowledge of English, he was capable of quoting the provisions of sec. 778 *verbatim* and of expressing a quite definite opinion under oath that the magistrate had no jurisdiction to try him. Such an adoption of the statements of another carries little weight in any case, and, in this, seems at variance with the facts.

At the trial the prisoner was represented by Mr. Thomas O'Connor. No affidavit has been obtained from Tresegne's counsel that the statement specified in sec. 778 was not made.

The record is obviously incomplete as to what occurred before the magistrate prior to the taking of the evidence. After giving the titles of the court and the case, the names of the accused, of the counsel engaged, and of the magistrate, and the date of the hearing, the 11th March, it proceeds:—

"Charged on the 23rd February in this year in this city did assault and beat one Rose Kemp, causing her actual bodily harm.

"Mr. O'Connor: I will elect to be tried summarily, your Worship, and plead not guilty."

The information bears on its face the note: "The prisoner elects to be tried summarily and pleads not guilty."

The evidence discloses that the accused, a man of 28, has for

years been infatuated with the girl, who is only 16. His attentions were resented, but he persisted, watching the Kemp house and following the girl along the streets, threatening her should she associate with another, and on one occasion striking her a severe blow. A letter produced at the trial written by Treseigne to Rose's father states that he will continue to watch (*guardia*) and make trouble should he find her in other company, "even if I am burned to death in the electric chair—*nella sedia elettrica*."

On the date mentioned in the charge against him, Treseigne, at the corner of Bay and Gerrard streets, came up behind the girl as she was returning from work, and, according to her evidence, knocked her down, and then hit her three or four times. "He was going to hit me again, and he saw my father running towards him, and he ran away."

Miss Kemp's evidence was corroborated by her father and by Dorothy Telesco, a co-worker from whom she had just parted. Knowing that Treseigne "always waited for the girl to come along," her father was on the alert lest she should be attacked, and saw the accused jump out, knock her down and strike her. Treseigne ran away when he saw Kemp coming across the street, but was pursued, captured, and handed over to the police.

The prisoner deposed that he did not strike the girl—just wanted to talk to her and warn her against another man. He was merely demonstrating the intensity of his love.

His evidence was not believed, and the magistrate announced that a conviction should be recorded, but granted a remand for a week in order that the prisoner should be examined as to his mental condition.

When the case was resumed on the 11th, a report had been received that Treseigne was responsible for his actions, and the magistrate imposed sentence. Mr. O'Connor protested that the offence established against his client was merely a common assault and that the sentence was too severe. He, however, made no suggestion that any preliminary step requisite to give the court jurisdiction to try the case summarily had not been taken.

The formal conviction recites that the accused consented to be tried summarily. I think it is not open to doubt that the requirements of sec. 778 were complied with in substance if not in precise form. *Rex v. Ogonosky and Barrie*, 28 O.W.N. 189, as not authority to the contrary. There was in that case positive and credited evidence that the prescribed warning was not given, and the accused were not represented by counsel.

In the case at bar the accused had the advantage of being

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App. Div. defended by a notably able lawyer, undoubtedly familiar, from his  
1926. long experience in courts of criminal jurisdiction, with the require-  
REX ments of sec. 778. He identified himself with his client and  
v. formally gave the consent required by sec. 78(3)\* to give the  
TRESEGNE magistrate jurisdiction to try the charge. It is not conceivable  
Latchford, that a counsel of such great experience as Mr. O'Connor had not  
C.J. in his mind a realisation of the provisions of the next section of  
the Code if in fact the proper warning had not been given.

In *Rex v. Mali* (1912), 1 D.L.R. 256, it was urged on behalf of the prisoner that the record did not state that, before giving his consent, he was addressed by the magistrate in the manner prescribed in sec. 778. On the return of a summons for a *habeas corpus* with *certiorari* in aid, Prendergast, J., said:—

“I do not think it necessary that the record should state this” (that the warning was not given). “The magistrate should be presumed to have accepted the prisoner’s consent in the proper manner and only after the necessary preliminary requirement of addressing him in the manner provided by the Code was complied with. That it is absolutely necessary that the magistrate should so address the prisoner, is over-abundantly established; but still, the fact remains that this is only a preliminary, leading to the prisoner’s election which is the essential element, and on proper evidence of the consent having been given, a presumption is established that the preliminary was complied with as it should have been.”

I incline to the opinion that the statement can be presumed to have been made in the present case. The fact that an assault had been committed could not seriously be disputed. No reason is suggested why a summary trial was not preferable to the delay and cost of a trial at the Sessions. In either case the utmost that any counsel could hope for was to shew that the girl had not been severely injured and that a light sentence would be sufficient punishment. The production and proof of the threatening letter which Tresegne instructed Mr. O'Connor that he had not sent, and then, in court, admitted writing, was a surprise to the learned counsel, whose only protest, at the end, was, as I have stated, against the severity of the sentence.

I consider that there was in the circumstances a compliance with the statute in all substantial respects.

That the assault caused bodily harm may be inferred from its

\* (3) If the person charged consents to the charge being summarily tried and determined as aforesaid . . . the magistrate shall reduce the charge to writing and read the same to such person, and then ask him whether he is guilty or not of such charge.



violence, which was sufficient to knock her down, and the blows inflicted upon her when she was lying in the street. "Actual bodily harm," in sec. 205† of the Code, means little if anything more than the old term "battery."

No ground has been established for the interference of this Court under the powers conferred by sec. 1014. Nor is the sentence unduly severe. Men of the disposition manifested by the prisoner must be taught that they cannot maltreat the unwilling objects of their affections, as Tresegne maltreated Miss Kemp, and escape grave punishment.

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The appeal, in my opinion, fails and should be dismissed.

*Appeal dismissed.*

#### [APPELLATE DIVISION.]

TETEF V. RIMAN.

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April 16.

*Costs—Scale of—Judgment of County Court as to—Right of Appeal—County Courts Act, sec. 40(d)—Bailment—Failure of Bailee to Deliver Goods Deposited with him for Safekeeping—Action to Recover Value—Whether Based upon Contract or Tort—Substantial Cause of Action—Goods of Persons other than Bailor—Right to Recover for.*

In an action brought in a County Court to recover the value of property of the plaintiff and two companions deposited for safekeeping with the defendant, a boarding-house keeper, and not returned, the County Court Judge gave judgment for the plaintiff for \$168 and costs on the County Court scale. The award of costs was made on the theory that the action was founded upon tort, and not upon contract, and so a Division Court would not have had jurisdiction:—*Held*, that in such a case a right of appeal from the part of the judgment dealing with costs is expressly given by sec. 40(d) of the County Courts Act.

(2) That, although the action as framed was upon a contract of bailment, the substantial cause of action was a wrongful act, and therefore the action was founded on tort, and the plaintiff was entitled to costs on the County Court scale.

Review of the authorities. *Bryant v. Herbert* (1878), 3 C.P.D. 189, and *Turner v. Stallibrass*, [1898] 1 Q.B. 56, specially referred to.

(3) That, upon the merits, the plaintiff was entitled to recover the sum awarded for his loss and that of his companions—a bailee cannot dispute the title of the bailor.

*Biddle v. Bond* (1865), 6 B. & S. 225, followed.

An appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff for the

† 295. Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment.



App. Div. recovery of \$168 and costs upon the scale of the County Courts.  
1926. The action was brought for the value of certain property of the  
TETEF plaintiff and two companions, deposited with the defendant for  
v. safekeeping and not returned. The defendant appealed upon the  
RIMAN. merits and also upon the question of the scale of costs.

April 1. The appeal came on for hearing before LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*I. Levinter* and *S. Eisen*, for the plaintiff, respondent, took the preliminary objection that the defendant had no right of appeal as to the scale of costs, as the case was governed by sec. 24 of the Judicature Act and Con. Rule 649.

*S. H. Bradford*, K.C., for the defendant, appellant, in answer to the objection, contended that the order as to costs had not been made in the exercise of discretion, and a right of appeal was given by sec. 40(d) of the County Courts Act. Dealing with the substance of the appeal, he argued that the evidence disclosed that Tetef was the mere agent and not the bailee of those whose property was contained in the envelope handed by Tetef to Riman, and therefore Tetef was not entitled to sue for their property. As to the scale of costs, the case was within the jurisdiction of a Division Court. The action was upon a bailment. It was based upon a contract. A contract was pleaded; and a breach thereof, namely, negligence in caring for the goods, the contract being to keep them carefully, was found by the trial Judge. Counsel relied upon *Fleming v. Manchester Sheffield and Lincolnshire Railway Co.* (1878), 4 Q.B.D. 81; *Steljes v. Ingram* (1903), 19 Times L.R. 534; *Baylis v. Lintott* (1873), 42 L.J.C.P. 119; *Heintzman v. Young* (1923), 54 O.L.R. 13.

*Levinter* and *Eisen*, for the respondent, contended that he was the bailee of those whose property he held, and, on his giving it into the custody of the appellant, the appellant became the bailee of the respondent, who was therefore entitled to maintain this action: *Biddle v. Bond* (1865), 6 B. & S. 225. The action was in tort and not in contract, and the trial Judge found gross negligence. The form of pleading did not matter. As the action was founded on tort, it was not within the jurisdiction of a Division Court. Reference was made to *Turner v. Stallibrass*, [1898] 1 Q.B. 56; *Kelly v. Metropolitan Railway Co.*, [1895] 1 Q.B. 944; *Edwards v. Mallan*, [1908] 1 K.B. 1002; *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; *Regina v. McDonald* (1885), 15 Q.B.D. 323; *Murphy v. Hart* (1919), 46 D.L.R. 36.

April 16. MIDDLETON, J.A.:—An appeal from the judgment of the Senior Judge of the County Court of the County of York, his Honour Judge Coatsworth.

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In this case the defendant appeals from the decision on the merits and also upon the question of costs. Upon the argument we concluded that the judgment in the plaintiff's favour should stand, and reserved our decision upon the question of costs.

The defendant keeps a boarding-house for the temporary accommodation of men seeking a bath, bed, and breakfast, all of which are supplied for a small sum. Each man is requested to hand over his valuables, which are placed in an envelope and given to the defendant, who returns them in the morning. The plaintiff handed over money and a watch, the property of himself and two companions. In the morning the package was not forthcoming, and this suit followed, resulting in a recovery of \$168 and costs upon the County Court scale.

It was urged that the plaintiff could recover for his own loss only; but, in our view, that is not so, for a bailee cannot dispute the title of the bailor: *Biddle v. Bond*, 6 B. & S. 225. Here there is no adverse claim, as the plaintiff's friends are ready to join as parties plaintiff if necessary.

A preliminary objection was taken to the right of appeal on the question of costs. This was based upon a misapprehension of the statutory provisions. By the Judicature Act there is no right of appeal upon the question of costs in the case of appeals from a Judge of the High Court Division (sec. 24), but there is no similar restriction in the case of appeals from other tribunals such as the County Court, Surrogate Court, or Division Court. If costs are dealt with by the Judges of these courts, in the exercise of their discretion, no doubt an appellate court would be extremely slow to interfere with the exercise of discretion; but, in the absence of facts justifying a departure from the general rule that costs should follow the event, subject to the special provision of the rules governing special cases, an appellate court will not hesitate to interfere with an order made as a mere matter of caprice and without foundation in justice. I am in this case satisfied that the order made was made upon full consideration and upon the theory that this action is founded upon tort, and not upon contract, and so the Division Court would not have had jurisdiction, and not as an exercise of discretion under Rule 649. In such case a right of appeal is now expressly given by sec. 40(*d*) of the County Courts Act. The judgment in review is a "decision or order of a Judge . . . pronounced or made at the trial . . . entitling him (the

App. Div. plaintiff) to County Court costs on the ground that the action is  
 1926. not of the proper competence of the Division Court."

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Contrary to the view I entertained at the argument, I have come to the conclusion, upon the cases, that the order should be affirmed. Had the matter been at large, I should have been inclined to hold that when, on the facts, the plaintiff might sue either in contract or in tort, he should not be allowed to sue in the superior court in tort and then to have the heavier costs of the superior court, unless there was some good reason why redress had not been sought in the inferior court by an action upon contract: *Baylis v. Lintott*, 42 L.J.C.P. 119, especially *per* Honynman, J. I should also have thought that when the action brought in the Superior Court is plainly upon contract and not in tort this should be conclusive against the plaintiff.

Here the action is upon contract. The payment of the fee and delivery up of the goods is alleged, and "the defendant did not safely keep or take proper care of the valuables and money, as he had verbally or impliedly agreed to do, but was guilty of negligence," etc.

There are known to the law many cases in which there is a concurrence of liability upon tort and upon contract. In Salmond's Law of Torts, 6th ed., p. 3, this is clearly put:—

"It is often the case . . . that the same wrong is both a breach of contract and a tort; and this happens in at least two ways. In the first place, there are many instances in which a person voluntarily binds himself by a contract to perform some duty which already lies upon him independently of any contract. The breach of such a contract is also a tort, inasmuch as liability would equally have existed in such a case had there been no contract at all: for example, a physician who harms his patient by negligently administering a deleterious drug is guilty of a wrong which is both a breach of contract and a tort. . . . Similarly, a bailee who wrongfully refuses to restore the property lent to him is liable both in contract and in tort: in contract because of his promise to restore it in due time, and in tort because no one has the right to detain another's property without some special justification."

In *Govett v. Radnidge* (1802), 3 East 62, the Court was compelled to decide whether an action *ex delicto* could be maintained against a carrier. The contract was made with three, two were acquitted by the jury, and if the action was in contract this would discharge the third. Not so if the action was in tort. After stating the contract, the declaration alleged "that the three defendants so carelessly, negligently, and unskillfully behaved and con-



ducted themselves in the loading such hogshead of treacle, that by reason thereof the hogshead was staved and the treacle lost." Lord Ellenborough and his associates thought this count "framed . . . upon alleged neglect of duty, and not upon the breach of any undertaking," and so the plaintiff held his verdict.

As illustrating how technical the situation was in those days, the case of *Corbett v. Packington* (1827), 6 B. & C. 268, may be referred to. There the plaintiff delivered to the defendant certain boars and pigs which disappeared. To make himself sure he claimed, first in tort, alleging the delivery of the boars and pigs to the defendant to be safely kept and fed, yet the defendant so carelessly and negligently kept them that they were lost; and, secondly, he alleged that he "delivered the said boars and pigs to the defendant for a consideration and reward and on the promise and undertaking of the defendant to take good care of them and deliver them to the plaintiff, yet the defendant, not regarding his duty, failed to return them and by his carelessness they were lost." There was a verdict for the plaintiff, but upon motion in arrest of judgment the plaintiff failed because, while he might have sued in either contract or tort, he could not sue in both in one action. I refer to the case because of the statement in the course of the judgment that the action would be in tort if based upon "the common law duty of the defendant to take care of the pigs delivered to him in order that the plaintiff might come and take them away," and "a mere common law duty although arising out of a contract" will found an action *ex delicto*. When the contract goes in any respect beyond the duty imposed at common law, the only remedy is in *assumpsit*.

Though, as shall be shewn, *Govett v. Radnidge*, *supra*, in the end prevailed, it was not permitted to go unchallenged. Sir James Mansfield, C.J., in *Powell v. Layton* (1806), 2 B. & P. N. R. 365, in a somewhat similar case, refused to treat the breach of duty on a carrier's contract as tort, saying (p. 373): "Upon the whole it appears to me that this action is founded on breach of contract; that it is not distinguishable from any other action founded on contract; and that the defendant is no more guilty of a breach of duty than every other person is who fails to perform his contract."

In *Pozzi v. Shipton* (1838), 8 A. & E. 963, at pp. 975, 976, the Court "purposely abstain from giving any opinion, whether the doctrine in *Govett v. Radnidge* or that in *Powell v. Layton* be the true doctrine, as we do not feel ourselves called upon to decide between them, supposing them to differ."

In *Marshall v. York Newcastle and Berwick Railway Co.* (1851),

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App. Div. 11 C.B. 655, the question was finally set at rest. The plaintiff was  
1926. valet to Lord Adolphus Vane, and his luggage was lost while he  
TETEF was a passenger on the defendants' railway. He was travelling  
v. with his master, who paid his fare. It was argued, for the defend-  
RIMAN. ants, that the action being in contract, and the contract being with  
Middleton, the master, the plaintiff could not sue, and Jervis, C.J., directed a  
J.A. nonsuit. In term he concluded that this was wrong. The action  
could be maintained, "not by reason of any contract between him  
and the company, but by reason of a duty implied by law to carry  
him safely," or, as put by Williams, J., "The whole current of  
authorities beginning with *Govett v. Radnidge* . . . establishes  
that an action of this sort is, in substance, not an action of contract,  
but an action of tort against the company, as carriers:" and the  
law thus established stands till to-day.

I shall not cite more recent cases dealing with this question, but shall now turn to the series of decisions dealing with the precise question to be dealt with, the application of the law to the jurisdiction of courts which can entertain actions upon contract for a larger amount than that which limits the jurisdiction in cases of tort.

In *Bryant v. Herbert* (1878), 3 C.P.D. 189, the plaintiff alleged that he owned a picture which he entrusted to the defendant. On the defendant refusing to return it, the plaintiff sued in detinue and recovered a verdict for £10, 1s. damages for detention. The defendant contended that the action was founded on contract, and could have been brought in an inferior court, and so he should have his costs. The Divisional Court agreed with him. Denman, J., discusses the nature of an action of detinue and shews that it was based on a bailment, real or fictitious, imposing upon the defendant an obligation to return the chattel bailed when his right to retain it as bailee has ceased to exist. A contract, real or fictitious, was the foundation of this obligation; and, although the breach of it was a wrong, it was so only in the sense in which every breach of every contract is a wrong. In theory the action was founded upon contract, and not upon wrong independent of contract, and in fact this action was based upon an actual contract alleged and proved, and the plaintiff had recovered the 1s. damages as upon a breach of contract and could not have recovered this in an action based on tort. Though as an abstract question an action for the wrongful detinue of goods may be based upon a wrong, this action was not so founded.

Upon appeal (*ib.* p. 389) this judgment was reversed. The decisions on the technical questions are, it is said, conflicting—

"It is not easy to make sense of them: perhaps the nature of the thing does not admit of it;" and, in the opinion of the Court, now that forms of action are abolished, "this useless, and worse than useless, learning should be disregarded, and the matter decided on its substance:" Bramwell, L.J., at pp. 391 and 392. Brett, L.J., thought that the action was technically founded upon contract, "but the statute meant to deal not with the form of action, but with the facts with reference to which the form of action is to be applied. Now, if that be so, the question then is, whether the cause of action in fact here is a cause of action founded on contract in the sense of its being a breach of contract, or whether it is founded on tort in the sense of it being founded on a wrongful act. I certainly have come to a very clear conclusion that where persons are sued in detinue for holding goods to which another person is entitled, the real cause of action in fact is a wrongful act, and not a breach of contract, because it may arise and occur when there is no contract. . . . The real substantial cause of action is a wrongful act, and I am not prepared to say that the statute did not mean when it used the words 'founded on contract,' or 'founded on tort,' founded on breach of contract as distinguished from founded on a wrongful act. If so the action is founded on a wrongful act, and therefore within the meaning of the statute is founded on tort."

Following the reasoning of this case, the Court of Appeal in *Taylor v. Manchester Sheffield and Lincolnshire Railway Co.*, [1895] 1 Q.B. 134, determined that an action for injury to a passenger on a railway was an action founded on tort within the statute, even though the passenger had paid the fare and had a ticket. What was complained of was not an act of omission but an act of misfeasance. "Contract or no contract, he could maintain an action for that." "The contract is merely a part of the history of the case," to shew "that he was lawfully upon the premises of the railway company:" *per* Lindley, L.J. "It is not disputed that, as a matter of pleading, a plaintiff, for a cause of action such as the present, may declare in either contract or tort; but this is not the governing consideration . . . It is equally clear that in such an action, whether the plaintiff sets up a contract or not, he must, in order to succeed, prove active negligence . . . I hold that an action against a railway company for personal injuries by reason of the active neglect of the company's servants, even though such person has taken a ticket, is an action founded upon tort, and not upon contract, within the 116th section of the County Courts Act:" *per* A. L. Smith, L.J.

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This case was carried a step further by another decision of the Court of Appeal in the same year, *Kelly v. Metropolitan Railway Co.*, [1895] 1 Q.B. 944, where the Court determined that the action was founded on tort, "whether the negligence charged is an omission on the part of the servant of the defendant to do some act that he should have done, or the commission by the servant of some act amounting to a misfeasance."

In *Turner v. Stallibrass*, [1898] 1 Q.B. 56 (C.A.), it was argued that, when an action was based on a contract of agistment of the plaintiff's horse, and it was said that the horse had been injured by being placed in a field with a dangerous wire fence, the action was founded on contract and not on tort, but the Court was of the contrary opinion. The form of action was not material, the way counsel presented this case at the trial made no difference, the sole question of importance was whether the contract was an essential part of the plaintiff's case. "The plaintiff shewed a good cause of action by proving a bailment on which a duty arose at common law on the part of the defendants not to be negligent in respect of the plaintiff's horse, independently of any contract, and a breach of that duty." "If the plaintiff, in order to shew a cause of action, must rely on a contract, the action is one founded on a contract; otherwise it is one of tort."

Particularly illuminating is the statement of Collins, L.J.: "I think some confusion may possibly arise from the expression of the rule on this subject as being that the test is whether the plaintiff is obliged, in order to maintain his action, to rely on a contract. The relation of bailor and bailee must arise out of some agreement of the minds of the parties to it; but that agreement of minds is not the contract contemplated by that mode of expressing the rule to which I refer. Such an agreement of minds is presupposed in the case of any relation which brings about the common law liability of a bailee to the bailor. Where such a relation is established, the result of the cases appears to be that, if the plaintiff can maintain his action by shewing the breach of duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule. . . . A distinction has been drawn between acts of misfeasance or nonfeasance which has given rise to some difficulty; but it seems to me that, whether the matter complained of is one of misfeasance or nonfeasance, the question really is whether it is embraced within the ambit of the common law liability arising out of the relation between the bailor and bailee."

The effect of this decision was fully recognised in *Sachs v.*



*Henderson*, [1902] 1 K.B. 612, an action by a tenant for damages for wrongful removal of fixtures from rented premises. This was held to be tort, though there was an express contract. "It is not enough, in order to establish that the action is one of contract, to aver that the duty arose in the last resort from a contract . . . in nearly all cases of breach of duty there must be some antecedent consensual relation between the parties, and that when once that relationship is established, and there is a breach of duty arising from that relationship, the action in respect of the breach would be one of tort:" pp. 615, 616.

The last English case, *Edwards v. Mallan*, [1908] 1 K.B. 1002 (C.A.), applies this law to an action against a dentist for damages for unskillfully extracting a tooth, portions being left in the jaw. Vaughan Williams, L.J., delivering the judgment of the Court, says: "If there is either a special contract or an implied contract arising from the relation of dentist and patient, and an action is brought upon the contract for a breach of duty arising out of that relation, then, in either case, if the plaintiff substantially does not rely upon any special term in the special contract, and only relies (so far as the implied contract is concerned) upon a contract the implication of which depends solely upon the relation of dentist and patient, in neither case would it be right that the action should necessarily be treated as one of contract."

The case of *Burke v. Shaver* (1913), 29 O.L.R. 365, is not in conflict with this. There the action was not for the breach of a general duty arising from the retainer of a solicitor, but for a direct breach of a positive contract to do a certain thing, and so different from *Laidlaw v. O'Connor* (1893), 23 O.R. 696.

*Fleming v. Manchester Sheffield and Lincolnshire Railway Co.*, 4 Q.B.D. 81, and *Steljes v. Ingram*, 19 Times L.R. 534, look the other way, but seem submerged by the cases quoted.

For these reasons the appeal should be dismissed.

LATCHFORD, C.J., and ORDE, J.A., agreed with MIDDLETON, J.A.

RIDDELL, J.A.:—I am not wholly satisfied with the reasoning in the English cases; but bow to their authority. In any case, I should not have allowed the appeal in view of the facts of the case.

MASTEN, J.A., being ill, took no part in the judgment.

*Appeal dismissed.*

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## [APPELLATE DIVISION.]

1926.

HUESTIS v. CITY OF TORONTO.

April 16.

*Municipal Corporations—Fall of Tree Planted in Highway—Injury to Passing Vehicle and Driver—Negligence—Liability at Common Law—Negligent Discharge of Duty Assumed by Municipal By-law.*

A tree planted in a city highway fell upon a motor car, damaging it and injuring the person driving it. The tree had long been in a decaying condition:—

*Held*, that the city corporation was liable to the owner and driver of the car for the damages sustained.

It was negligence at Common Law to allow a thing potentially dangerous to remain on the property of the corporation; and the corporation, having by by-law assumed the duty of caring for the trees planted upon the highway, was liable for discharging that duty negligently (MIDDLETON and MASTEN, J.J.A., doubting whether negligence was established).

AN appeal by the defendant municipal corporation from the judgment of the County Court of the County of York in favour of the plaintiffs, husband and wife, for the recovery of \$400 and costs in an action for damages for injury caused to one of the plaintiffs and damage to the motor car of the other by the fall of a tree in a highway upon the car.

April 1. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*W. G. Angus*, for the appellant corporation, argued that the true condition of the tree was not apparent to the ordinary observer, though the tree may not have been sound. In such a case there could be no liability on the part of the municipality. There was no duty on it to examine the inside of a tree, and a reasonable inspection would not have shewn the decay: *Palmer v. Bateman*, [1908] 2 I.R. 393. The negligence alleged was in the nature of nonrepair; the onus of shewing it was upon the plaintiffs; and they had not satisfied it: *Raymond v. Township of Bosanquet* (1919), 59 Can. S.C.R. 452, 50 D.L.R. 560; *Castor v. Township of Uxbridge* (1876), 39 U.C.R. 113; *Tarry v. Ashton* (1876), 1 Q.B.D. 314; *Jones v. City of Greensboro* (1899), 124 N.C. 310. The corporation had no notice of the defect. The evidence of experts as to the condition of the tree, when these witnesses did not see the tree standing, was not conclusive: *William Hamilton Manufacturing Co. v. Victoria Lumber and Manufacturing Co.* (1896), 26 Can. S.C.R. 96.

*L. M. Keachie*, for the plaintiffs, respondents, contended that the tree should have been suspected for a long time, owing to its

apparent condition. There were many indications of decay, which could have easily been discerned. The non-observance of this condition was negligence, for which the appellant corporation was liable: *Ferguson v. Township of Southwold* (1895), 27 O.R. 66; *Gilchrist v. Township of Carden* (1876), 26 U.C.C.P. 1; *Sandlos v. Township of Brant* (1921), 49 O.L.R. 142. The corporation was also liable under its by-law No. 4315, under which it assumed the care and supervision of all trees planted in the city.

*Angus*, in reply, submitted that the corporation had taken all the care called for by the by-law. The condition of the tree could not be determined by reasonable inspection.

April 16. LATCHFORD, C.J.:—This is an appeal from the judgment of his Honour Judge Denton, dated the 12th January, 1926, in favour of the plaintiffs for \$400 damages and costs.

Damages to the extent stated were sustained by the plaintiffs when a tree in Sorauren avenue, a public highway, vested in the defendant corporation, fell upon a passing motor car owned by the male plaintiff, smashing the car and injuring the driver, his wife and co-plaintiff, who, as found by the learned Judge, had done everything possible to avoid the accident. It was also found that the tree had long been in a decaying condition, easily discoverable, yet negligently not observed by the city's servants and workmen. Liability was held to attach on two grounds—nonrepair of the street and the maintenance on the city's property of a large tree so decayed as to be liable to fall.

While there was sufficient living wood and bark in and on the trunk to sustain foliage elsewhere than on the large dead limb, the tree at the butt and for a considerable distance above it was badly decayed and worm-eaten, and its rotten condition could easily have been ascertained by the city's workmen, who, at intervals of at least three years, go from tree to tree applying insecticides. These men did not appreciate the significance of the dead branch nor the fact that ants in great numbers resorted to the tree, nor did they make use of the simple tests known to all woodsmen in order to determine whether a tree, manifesting easily perceived symptoms of decay, was rotten at the base, as this silver maple undoubtedly was, and therefore liable to fall in a high wind and cause damage, as this tree did, to a person lawfully using the highway.

Apart from its liability at Common Law, on well established principles, in allowing a thing potentially dangerous to the public and actually causing damage to the plaintiff, to remain on its

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App. Div. property (see *Tarry v. Ashton*, 1 Q.B.D. 314), the city is liable,  
 1926. as found, in another aspect.

HUESTIS By its by-law No. 4315 the defendant assumed the care and  
 v. supervision of all trees planted in the city and prescribed that  
 CITY OF "trees . . . dead or partly dead . . . shall be removed as  
 TORONTO. may by the Parks Commissioner be deemed advisable."

Latchford, I would therefore dismiss the appeal.  
 C.J.

RIDDELL and ORDE, JJ.A., agreed with LATCHFORD, C.J.

MIDDLETON, J.A.:—The defendant by its by-law voluntarily assumed the duty of caring for the trees planted upon the highway and pruning and tending them and removing dead branches and trees. This duty having been assumed, a corresponding liability is imposed when the duty is negligently discharged. I should have hesitated to find negligence in this case, but a very careful Judge had no hesitation in finding it, and a majority of my brethren think he was right. I am not confident enough to dissent on this question of fact. The appeal should be dismissed with costs.

MASTEN, J.A., agreed with MIDDLETON, J.A., sharing his doubt as to the finding of negligence.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

1925. ADA BRADLEY V. IMPERIAL BANK OF CANADA.

July 30. IMPERIAL BANK OF CANADA V. ADA BRADLEY.

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April 19. IMPERIAL BANK OF CANADA V. FLORENCE BRADLEY.

*Husband and Wife—Guaranty by Wives of Partners of Account of Husbands' Firm with Bank—Absence of Undue Influence—Independent Advice of Solicitor—Misrepresentations of Husbands—Whether Agents or Associates of Bank—Belief of Wives that Signing of Documents mere "Matter of Form"—Plea of non est Factum—Condition—Evidence—Findings of Trial Judge—Mortgages Made by Wives.*

A written instrument was signed by the wives of the two members of a mercantile partnership, guaranteeing the account of the partnership with a bank, and mortgages of land were also executed by the wives for the like purpose. The partnership having become insolvent, the bank sued upon the guaranties and sought to enforce the mortgages:—



*Held* (MULOCK, C.J.O., and FERGUSON, J.A., dissenting), that, the onus being on the wives, who attacked the transaction, to prove affirmatively undue influence by the husbands, and knowledge thereof by the bank, and there being no evidence of undue influence, and no evidence that the husbands were employed or used by the bank as its agents to get the guaranties signed, and the wives having received independent advice from a solicitor, the bank was not chargeable for any inadequacy in the advice or for any misapprehension on the part of the solicitor or on that of the wives.

*Bank of Montreal v. Stuart*, [1911] A.C. 120, followed; and *Hutchinson v. Standard Bank of Canada* (1917), 39 O.L.R. 286, considered and explained.

It was alleged that the wives were induced to sign the guaranty by the misrepresentation of the husbands that the documents were mere matters of form:—

*Held*, that the evidence did not bring the case within the plea of *non est factum*: to sign a document as a matter of form involves the intention to execute the document under the belief that it has some legal effect, but that that effect will be negligible—it does not indicate a false impression of the character and meaning of the document itself.

Review of the authorities.

*Per* SMITH, J.A.:—Even assuming that the wives did not have the documents sufficiently explained to them and did not fully understand them, that circumstance could not of itself relieve them of liability.

*Per* MULOCK, C.J.O.:—The finding of the trial Judge that the wives' signatures to the guaranty were procured by the false representations made to them by their husbands as to its nature should be affirmed; and, as it did not appear that, because of the guaranty, the bank altered its position, the guaranty should be declared void.

*Per* FERGUSON, J.A.:—If a creditor and debtor agree that it is in the interest of both that the debtor's wife shall be induced and persuaded to become surety for the husband's debt and that the husband shall negotiate with his wife to that end and obtain her signature to a document of guarantee, the debtor and creditor should be regarded as co-workers and associated as principal and agent in the negotiating and procuring of the wife's agreement and the execution of the document by her, to the extent and end that the contract of guarantee obtained by the husband shall, in the hands of the creditor, be affected by any breach of duty by the husband in procuring the wife's agreement and signature; and, if it be made to appear that the husband procured the execution of the document by undue influence, fraud, duress, misrepresentation, or other breach of duty, the creditor cannot successfully plead, as against the wife, lack of notice of wrongdoing on the part of the husband.

*Bridgman v. Green* (1755), 2 Ves. Sen. 627, *Turnbull & Co. v. Duval*, [1902] A.C. 429, *Chaplin & Co. Ltd. v. Brammall*, [1908] 1 K.B. 233, *Bank of Montreal v. Stuart*, [1911] A.C. 120, and *Musgrave v. Morton* (1924), 57 N.S.R. 369, referred to.

The facts and the findings of the trial Judge brought the case within the above proposition.

The mortgages were valid and binding (FERGUSON, J.A., dissenting as to the mortgages made by one of the wives after the execution of the guaranty).

THESE three actions were tried together by LENNOX, J., without a jury, at St. Catharines.

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*Christopher C. Robinson*, K.C., and *J. I. Grover*, for Ada Bradley.

*A. C. Kingstone*, K.C., for the Imperial Bank of Canada and for John Arthur Forster, made defendant with the bank to a counterclaim in the third action.

*William Douglas* and *Donald Douglas*, for Florence Bradley.

July 30, 1925. LENNOX, J.:—Ada Bradley is the wife of George R. Bradley, and he and his brother Alfred E. Bradley carried on business in partnership as grocers in St. Catharines and other places under the name of Bradley & Son. Bradley & Son failed and made an assignment in March, 1924.

For many years and down to the time of the assignment the firm did its banking in the Imperial Bank. The action brought by Ada Bradley is to restrain the defendant bank from proceeding to sell the plaintiff's property under the provisions of two mortgages executed by herself and others.

The action by the bank against Ada Bradley is upon a guaranty of Bradley & Son's account, executed by Ada A. Bradley and others. The actions were tried together. I have read the reporter's notes of the evidence and arguments of counsel.

The case most relied upon by Mr. Kingstone, *Gold Medal Furniture Co. v. Stephenson* (1913), 10 D.L.R. 1, a Manitoba case, is not relevant, the facts are so radically different. Mrs. Stephenson was a member of the debtor-company and its secretary. In proportion to their respective holdings she was interested, just as her husband was, in maintaining the company's credit and obtaining goods from the plaintiffs. And, what must be conclusive in itself, there was evidence of no inducement, persuasion, or misrepresentation by anybody; there was no evidence whatever as to the circumstances surrounding the execution of the document in question; for anything that appeared the idea of the secretary may have originated with Mr. Stephenson.

There are relevant cases, of course, such as *Turnbull & Co. v. Duval*, [1902] 2 A.C. 429, 71 L.J.P.C. 84, and *Chaplin & Co. Ltd. v. Brammall*, [1908] 1 K.B. 233, 77 L.J.K.B. 366, cases in which the wife was held not to be bound, and *Howes v. Bishop*, [1909] 2 K.B. 390, 78 L.J.K.B. 796, shewing that independent professional advice is not an essential condition of validity, if it is shewn that the wife did in fact understand what she was doing. The issues I have to determine turn, however, not upon the application of abstruse questions of law, but upon a careful consideration of conflicting evidence and a right conclusion as to who ought to be believed.

The Imperial Bank also brings action against Florence Bradley as a guarantor on the same bond. This action was tried at the same court, and the evidence is so nearly identical and closely interwoven that the decision as to liability or non-liability in both cases must be the same. To avoid having to repeat, I desire to be understood as meaning that what I say as to credibility of witnesses in Ada Bradley's action equally applies to the evidence of these witnesses in the Florence Bradley litigation.

There were no disinterested witnesses upon the trial of any of the issues I have to dispose of. Indirectly George and Alfred Bradley will be financially affected by the result of the pending litigation, and no doubt each had this in his mind when giving evidence. There can be no doubt, of course, as to the intense anxiety of these two women. I believe Mr. Lancaster to be a straightforward, efficient, and honourable practitioner; but, all the same, I find it impossible to conceive that in giving evidence he was unconscious of the circumstance that his story must inevitably count for or against his reputation as a lawyer.

All these burdens, however, were easy to be borne as compared with the load weighing Mr. Forster (the agent of the bank at St. Catharines) after receipt of the letters from the head-office of the 3rd and 20th March, 1922, pointing out that he had ignored his express written undertaking of the year before, had exercised poor judgment in dealing with the account, had exceeded the authorised line of credit, declining the application for credit, and, instead, insisting upon immediate security and substantial periodical reductions. Forster was then an elderly man—too old to adopt a new calling; he was in desperate plight—it meant “make good or get out.” Of course he presented the most hopeful view of the situation, amongst other things, retrenchments and accounts, of which, however, I find no tangible evidence; but the head-office regarded the account as “neither safe nor desirable,” and it is the fact that, gauged by “liquid assets,” the universal test of commercial solvency, in March, 1922, and continuously thereafter, the firm of Bradley & Son was hopelessly insolvent.

This haunting nightmare of impending personal disaster, largely brought about by his own acts, was the embarrassing situation confronting Forster during two years of unavailing struggle, and the force that drove him into his not very creditable attempts to shift an ordinary banking hazard from his employers to the shoulders of two defenceless women: and I am afraid that this sinister influence still clung to him when he gave evidence in court.

Having regard to the manner in which the matter of advising was thrown at Mr. Lancaster, I do not know that it makes much

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difference whether George Bradley or Mr. Forster was the medium of communication; but I have come to the conclusion that as a matter of fact it was a joint and several undertaking of the two. I have no doubt that George Bradley spoke in a casual way to Mr. Lancaster about advice, as stated by the latter, after these two men had, without communication with the ladies affected, mutually settled upon the solicitor to advise them. But the basis of the advice was not the document in suit but a meaningless blank form—a mystery so far as its origin is concerned. It certainly was not in any way connected with any one representing Bradley & Son, and, if it was sent by the bank, as I am quite satisfied it was, it seriously disturbs the evidence of Forster at many points.

Now, as to the credibility of the witnesses.

The matters as to which the evidence of Alfred G. Bradley is in conflict with Mr. Forster's evidence are not very numerous, and perhaps, except as to whose testimony is most reliable, not very important. Well then, interested as no doubt they are, where the evidence of these two Bradleys, or either of them, conflicts with the evidence of Mr. Forster, I have more faith in the accuracy of the Bradleys and accept their evidence in preference to Mr. Forster's.

Taking up now the question of the guaranty as it affects Ada Bradley, party to the two actions I am now dealing with, there are two questions, and, of course, the first is: Is Ada Bradley, by execution and delivery of the guarantee bond sued on, dated the 1st March, 1922, responsible for the indebtedness of Bradley & Son to the extent of \$15,000, without reference to the subsequent independent professional advice referred to? There is no magic in professional advice—it is enough, when the wife pledges her property to assist her husband, that she has had a fair chance to protect herself, and knows what she is doing—if this condition exists she is bound. In March, 1922, Ada Bradley actually knew nothing of the financial position of Bradley & Son, but believed they were prospering. I am satisfied that her account of what occurred when she signed the guarantee bond is substantially accurate, and that, influenced to some extent, perhaps, by the previous signatures, she was induced to sign by the false—I think knowingly false—statements of her husband, and that, unless subsequently validated by the alleged independent advice, the guaranty is not enforceable. It is quite true that the husband is not to be regarded as specifically the bank's agent—it was a case of mutual interest and concerted action. The bank left this part of the carrying out of the joint purpose in the hands of George Bradley, and, as said by Lord Justice Vaughan Williams in delivering the judgment of the Court in *Chaplin & Co. Ltd. v.*



*Brammall*, [1908] 1 K.B. at p. 238, and referring to the judgment in *Turnbull & Co. v. Duval*: "So here the plaintiffs left everything to the defendant's husband; they furnished him with the document that he might get his wife's signature to it, and they must take the consequences of his having obtained it without explaining to her or her understanding what she was signing." In my opinion, as to this branch of the contention, the bank fails. This doctrine is not necessarily confined to the relation of husband and wife, the instrument is vitiated by reason of the false statements knowingly made. Without reference to the relationship of the parties, I find as a fact, after a protracted effort to understand it, that neither of these ladies would have understood the meaning and effect of this guaranty, if they had read it repeatedly and pondered it for a week; and the bank's contention that, in any event, the guaranty is enforceable by reason of subsequent advice and ratification, I think, also fails. I don't think there was advice at all of any kind *as to this bond*. It was executed weeks before Mr. Lancaster entered upon the scene. He never was in a position to advise. He was not shewn the instrument in question—representing an aggregate guaranty of \$60,000. He was not told anything and did not inquire about the progress, character, or prospects of the partnership business, the bank-account, the assets of the firm or its partners, the reason or purpose of the guaranty or its limit, the persons other than the wives to become guarantors, or the character of the property of the guarantors or their resources. In short, he had no information upon which to base or offer an opinion. He did not even know that the guaranty had already been signed and delivered—therefore he could not offer then the alternative of ratifying or rescinding—and, without this, advice was farcical. When advising, Mr. Lancaster had not even a blank form to guide him. In what Mr. Lancaster says he called attention to and advised, I find nothing that would cover exclusion of benefits of "discussion and division," provided for in para. 3, nor as to liability for customers' debts incurred for three months after notice (para. 4)—not the sweeping provisions of para. 7, nor the possible guaranties of strangers in substitution for husbands (para. 9), or the drastic and to my mind unreasonable provisions of paras. 10 and 11. I don't think Mr. Lancaster ever entered upon the matter seriously—if he had, he would have insisted upon full information and upon meeting the parties to be bound face to face; and he would have a record of the instructions—the basis of the advice—and, in general terms, the terms in which he advised them.

If, on the other hand, owing to exceptional circumstances, and

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they would have to be exceptional and practically imperative to justify the method adopted here, a solicitor advises by telephone, he would, if he regarded it as a serious or important matter, adopt some method to preserve a record of the basis he advised on and what he advised, either by letter to the client or by his stenographer's transcript of what he heard him advise over the telephone. These two ladies were advised to the same effect and substantially in the same terms. Both are in direct conflict with Mr. Lancaster's recollection. I do not feel compelled to decide as to which (the covenants or Mr. Lancaster) comes nearest to what Mr. Lancaster actually said, for the material point is how far he was understood at the other end of the line. Their minds never met. Lancaster was talking of a thing to be done—they understood him to be referring to *and they were referring to* a closed transaction, in weeks gone by. Whatever Mr. Lancaster may have actually said or intended to say, I am satisfied that the evidence of each of these two guarantors at the trial was a substantially accurate repetition of what she understood Mr. Lancaster to say over the telephone and of what she said in reply. I am of opinion that the alleged advice does not help the situation: the bank fails.

If I am right in the conclusion I have reached as to the guaranty, it is, I think, quite clear that the bank should be restrained from proceeding to enforce the mortgages as well. The execution of both by Ada Bradley was procured by the false and fraudulent misrepresentation of the person to whom the defendant bank delivered them for execution. The plaintiff was not afforded an opportunity of reading them and would not have understood them if she had. There was no consideration *to anybody* for the execution of these mortgages. The renewal of credit was declined on the 3rd March. Bradley & Son was then insolvent, as the bank knew and in effect declared, and the purpose of the head-office was to realise as rapidly as possible, making such interim advances as would enable the bank by temporarily nursing the business along to realise the whole or the bulk of its claim. I find as a matter of fact that the mortgages were executed by Ada Bradley in the manner, upon the representations, and under the conditions by her described.

There will be judgment dismissing the action brought by the Imperial Bank with costs, and in the Ada Bradley a *tio*n restraining the Imperial Bank from proceeding to enforce the mortgages, also with costs to be paid by the bank.

The action by the bank against Florence Bradley was brought to recover judgment against her for the balance owing the bank

by Bradley & Son under the terms of a guarantee bond dated the 1st March, 1922, signed by this defendant and others. This is the same guaranty that George Bradley persuaded his wife to execute, and the subject-matter of an action by the bank against Ada Bradley, which I have just dismissed. The representations made by Alfred E. Bradley to the defendant in this action to induce her, and by which she was induced, to become a party to the bond sued on, were in substance and effect the same as George Bradley made to his wife. The defendant here, as in the other case, was wholly ignorant of the condition or financial position of Bradley & Son or the state of their bank-account.

The position of the defendant here as regards the guarantee bond is not distinguishable in principle as to its execution or the alleged professional advice from the case of Ada Bradley.

The account sworn to by this defendant of what occurred at the time she executed the bond and the reasons that induced her to do so are, in my opinion, true and substantially accurate.

I find that, if Mr. Lancaster's recollection of what he spoke into the telephone with this defendant on the line is accurate, nevertheless this defendant did not catch or apprehend it as Mr. Lancaster put it in his evidence, and that the incoming conversation, as she caught and understood it, and what she said in reply, were substantially and in effect as she stated in court. For the rest I wish to be understood as repeating, *mutatis mutandis*, my reasons for judgment in the similar action against Ada Bradley. The action at the suit of the bank fails.

After the action was under way, John Arthur Forster, the local bank-manager, was brought in as a party, and the defendant counterclaims against the bank and Forster for an account of moneys amounting to \$2,500—the proceeds or consideration-money of a mortgage of land made by the defendant to Forster and others as trustees, executed about the 11th December, 1923.

The defendant executed this mortgage upon the representations and at the instance of the husband, and as a loan, as she puts it, of the consideration-money to Bradley & Son to pay off certain creditors who had sued or were threatening immediate suit. These representations were substantially — I think they were perhaps almost—true. So far as the loan of the money is concerned, Forster could hardly be said to be acting *quâ* bank-manager. About \$500 appears to have gone just as it was intended; as to the rest, there is nothing at all clear. Any portion of this money which was diverted by Forster to reduce the indebtedness of Bradley & Son to the bank was an unauthorised conversion, for which the bank and Forster must account. The loan by Mr. Forster and

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others was quasi-personal, but the bank cannot, in the circumstances, be regarded as wholly unconnected with it. As the bank's local manager, Forster, was nursing the account and anxious to quiet the general creditors until the bank could secure a reduction of Bradley & Son's account and work to a position of greater security, Forster initiated the idea of this loan, proposed it and urged it upon the partners. It became the common scheme of the bank and Bradley & Son, and they left it to Alfred E. Bradley to take the mortgage to his wife and *have her* execute it. By this time they knew all about the need of advice—help—to a woman in the position of Florence Bradley, but they afforded none. She was made to believe that a specific sum of \$2,500 was required immediately to quiet "certain specific creditors represented at a certain meeting," and the mortgage-money would be applied in that way and have that effect. I cannot find that more than \$1,300 or at most \$1,500 was applied.

There will be a reference to ascertain the difference, and judgment for the amount as ascertained, in case the parties cannot agree; and judgment dismissing the action on the guarantee bond and setting it aside, with full costs of the combined proceedings to be paid by the bank to the defendant.

The bank appealed from the judgments of LENNOX, J., in the three actions.

January 25 and 26 and February 10 and 11. The appeals were heard by MULLOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

W. N. Tilley, K.C., and A. Courtney Kingstone, K.C., for the appellant bank, contended that the trial Judge erred in finding that neither Ada Bradley nor Florence Bradley had been given independent legal advice before signing the guaranties and the mortgages. The evidence of the solicitor who had advised them shewed that they had been given such advice and that they were in a position to know the nature of the documents. His evidence, being that of an independent witness, should be preferred to that of the respondents. There is a presumption in law that a signatory to a document knows the nature and effect of the document. This presumption has not been rebutted here. It is not sufficient to prove a mere absence of independent advice; the onus was on the respondents to prove actual fraud or misrepresentation, to which the bank was a party. This onus was not successfully borne. The husband of Ada Bradley was not the agent of the bank, and Florence Bradley's husband could not have been the bank's agent,



because he took no part in the negotiations leading to the signing of the documents. Reference to *Bank of Montreal v. Stuart*, [1911] A.C. 120; *Bank of Montreal v. Holoboff*, [1924] 3 D.L.R. 418; *Gunns Ltd. v. Simister* (1924), 26 O.W.N. 391; *Hutchinson v. Standard Bank of Canada* (1917), 39 O.L.R. 286; *Gold Medal Furniture Co. v. Stephenson*, 10 D.L.R. 1; *Turnbull & Co. v. Duval*, [1902] A.C. 429; *Robinson v. Mills* (1922), 68 D.L.R. 130; *Fairweather v. McCullough* (1918), 43 O.L.R. 299; *Cobbett v. Brock* (1855), 20 Beav. 524.

G. W. Mason, K.C., and J. I. Grover, for the respondent Ada Bradley, argued that there was a duty upon the bank to ascertain that the respondents knew the nature of the documents which they were signing, and their liability under the documents. The evidence shewed that the documents were executed before any independent advice was received by the respondents, and that the advice when given was not that independent advice which the law requires, because the solicitor who advised was himself unaware of the nature of the documents and all the surrounding circumstances. The minds of the adviser and the respondents were never *ad idem*; the advice was given by telephone, and the important element of juxtaposition was lacking. *Gold Medal Furniture Co. v. Stephenson* is distinguishable upon the facts. *Fairweather v. McCullough* and *Cobbett v. Brock* are also distinguishable, because in those cases there was knowledge of the nature of the documents and the liability assumed thereunder. In cases similar to the case at bar, the husband is not the agent of the wife, and if the bank chose to retain him as the medium of communication between the bank and his wife, the bank did so at its peril. It is not necessary to prove agency to succeed here, nor was there any onus on the respondents to shew actual fraud or misrepresentation to which the bank was a party. Proof of absence of independent advice is sufficient. The respondents did not know what they were signing, and the principle involved in the maxim *non est factum* is applicable. In any event, there was no consideration for the signing of the guaranty or the mortgages. Reference to *Howes v. Bishop*, [1909] 2 K.B. 390; Halsbury's Laws of England, vol. 15, p. 104; *McLean v. Maze*, [1924] 4 D.L.R. 255; *Bank of Montreal v. Holoboff*, [1924] 3 D.L.R. 418; *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489.

I. F. Hellmuth, K.C., for the respondent Florance Bradley, argued that this was clearly a case coming within the maxim *non est factum*. The respondents were deceived as to the nature of the documents they were signing. The onus was upon the bank to ascertain that the respondents were given adequate independent

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advice before the execution of the documents. Reference to *Talbot v. Von Boris* (1910), 27 Times L.R. 95; *Bagot v. Chapman*, [1907] 2 Ch. 222; *Rose v. Mahoney* (1915), 34 O.L.R. 238; *Lewis v. Clay* (1897), 67 L.J.Q.B. 224; *National Union Fire Insurance Co. v. Martin*, [1924] S.C.R. 348; *Bank of Montreal v. Stuart*, [1911] A.C. 120, 123.

*Tilley*, K.C., in reply, argued that, upon the evidence, there was consideration for the signing of the documents; and that there was no liability upon the bank to account for the mortgage-moneys.

April 19. HODGINS, J.A.:—I think the law as to undue influence and independent advice in the case of a married woman has been settled for us by the case of *Hutchinson v. Standard Bank of Canada*, 39 O.L.R. 286, 288. It is there stated:—

“In a husband and wife transaction there was no presumption of undue influence; that no burden was cast on the person sustaining such a transaction to prove that the wife had independent advice; but that, on the contrary, it was upon the person attacking the transaction to prove affirmatively undue influence by the husband and knowledge thereof by the creditor.”

This is founded upon and fully borne out by the cases cited therein, principally the well known case of *Bank of Montreal v. Stuart*, [1911] A.C. 120. I find in the present case no trace of undue influence. With regard to independent advice, it is enough to say that the bank refused to consider the application for renewal credit without being shewn that the wives had had independent advice, and obtained evidence of it by a certificate from Mr. Lancaster, endorsed on the instrument of guarantee, as follows:—

“Florence M. Bradley and Ada A. Bradley have consulted me and have been advised as to the nature and effect of this guaranty. (Sgd.) E. A. Lancaster.”

Unless, then, it could be shewn that the husbands were employed or used by the bank as its agents to get these guaranties signed—of which element I can find no trace—I can see no reason for holding the bank chargeable for any inadequacy in the advice given by Mr. Lancaster or for any misapprehension either on his part or on that of the wives. To do so would be, in effect, to decide that when the bank advises its customer of its requirements, then in procuring what they insist upon, he becomes their agent and they are consequently chargeable with his defaults.

As to the other reasons urged, these need more detailed consideration. The one most pressed was that the wives were induced to sign the guaranties because they were assured that they were matters of form required by the bank because each was the wife of a

member of the grocery firm which was seeking further credit from the bank. This is stated in the words of Ada Bradley (and practically to the same effect by Florence Bradley):—

“A. He left the dining room to get his coat and hat, and he came back with this paper in his hand, and the pen and ink. He came towards me, as I thought, to say good-bye to me. I looked up and saw this paper and the pen and ink. He said, ‘I have a paper here that I want you to sign for the bank.’ I said, ‘Oh, why? What have I got to do with the bank?’ He said, ‘Oh, nothing, You have nothing to do with the bank. It is really nothing to bother you about at all. It is just a matter of form for the bank that I want you to sign as my wife.’ So I took the paper—no, I don’t believe I did. He laid it on the table before me, placed the pen and ink. I looked down at it. I saw the signatures of my brother-in-law, Mr. Alfred Bradley, and his wife. I made some remark, I said, ‘Oh, the banks are getting awfully fussy these days,’ or something to that effect, and signed the paper, thinking no more of it, and that it was some matter of form as he told me. I did not read it. I didn’t see anything, in fact, on the paper but the signatures.

“Q. Did he explain it to you at all? A. No, he said nothing to me at all, excepting that it was a matter of form for the bank, and that I must sign it as his wife.”

In cross-examination she is asked the following:—

“Q. 66. You knew it was being signed to help your husband in some way or other? A. He said that the bank said the wives’ signatures must be on that paper to carry on business.

“Q. Was it or was it not in connection with the Bradley business? You have got the other off pat. A. I suppose it was or he would not have wanted my signature.

“Q. You knew that at the time, that it was in connection with the business, didn’t you? A. I suppose.”

I think the situation thus outlined does not bring the case within the plea of *non est factum*. To sign a document as being a matter of form involves, to my mind, the intention to execute the document, such as it is, under the belief that it has some legal effect, but that that effect will not be other than negligible. This indicates carelessness or even recklessness as to its real effect, but not a false impression of the character and meaning of the document itself.

It does not mean that the signature is in itself a mere formality such as that of a witness (so far as personal liability is concerned).

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The illustration of what was in the minds of these ladies is given by Ada Bradley thus:—

“Q. Had you signed papers before with your husband in connection with any dealing of your husband, or business of your husband? A. The time the store was bought I had signed a paper for the security loan, the mortgage on the store—the time the store was bought.

“Q. When was that? A. That would be in 1920.

“Q. A couple of years before this? A. Yes . . . I thought I was signing merely as the wife of one of the partners, as I would if he were buying property.”

There was no reason why the wives should not have read the document, or had it read or explained to them. Further evidence from Ada Bradley indicates this:—

“Q. There was nothing to prevent you from seeing the whole of it if you had wanted to? A. If I had asked him, and we had time, he would not have stopped me, I don't suppose, but I didn't ask him and I didn't think to ask him. . . .

“Q. If you had asked to read it, or asked your husband to read it to you, he would have read it to you. There is no doubt in your mind about that? A. If I had insisted. Probably because he was in a hurry he did not want to take the time, I have no doubt, to read it to me.”

The evidence of Florence Bradley does not differ in kind from these statements; indeed there is great similarity in the words used.

The plea of *non est factum*, when set up against a document signed in fact, means that the mind of the party who signed never went with the deed. It ought not, and I do not think it does, cover a case where the signature is affixed to a document which is to have effect in reference to the husband's business so that it could be carried on, but where that effect is so minimised or diminished in the signer's mind as to be equivalent to a mere matter of form. Here both Mrs. Bradleys refer to the bar of dower required in a mortgage, where the husbands bought property, the effect of their signatures being understood by them as having a legal, but at that time a very unsubstantial, effect. The conclusion I arrive at would seem to be fortified by the fact that both ladies, when Mr. Lancaster spoke to them with a view to advising them, and asked if they were satisfied with the paper they had signed, replied in effect:—

“Mr. Bradley said it was all right, so I signed it and he took it back.”

So that, according to their evidence, this inquiry aroused no curiosity nor any sign of interest or apprehension in regard to the



paper which they had executed in such a careless way. Mr. Lancaster's evidence carries the matter much further, and if his evidence is accepted in preference to what I have quoted, as I think it should be, the approval and consent of these ladies to abide by whatever they had signed would inevitably be inferred. There are some decisions the principle of which seem to support the point of view which I think should be adopted.

In *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489 (followed in *Bank of Ireland v. McManamy*, [1916] 2 I.R. 161), Buckley, L.J., pp. 495, 496), said:—

“The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying, ‘this is a conveyance of your property,’ or ‘this is your lease,’ and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatsoever they are. If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed.”

In *Howatson v. Webb*, [1907] 1 Ch. 537, 549, Warrington, J. (now L.J.), said:—

“I may go so far in the defendant's favour as to say that Webb, having regard to his knowledge of Hooper, when Hooper said that the deeds were ‘deeds for transferring the Edmonton property,’ was justified in believing that they were deeds such as a nominee could be called upon to execute either in favour of a new nominee or for the purpose of putting an end to his own position of nominee, and certainly not a deed creating a mortgage to another person. But in my opinion that is not enough. He was told that they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question of dealing with the property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents.”

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This case was approved and affirmed by the Court of Appeal in [1908] 1 Ch. 1, in which Fletcher Moulton, L.J., said:—

“If he did not choose to examine whether this transfer by way of mortgage contained a personal covenant to pay, or if, as is more probable, he never thought of the point at all, that is not a matter that can affect the consequences of his signing it.”

Sir William Anson, who examined the *Bragg* case in 28 L.Q.R. 190, chiefly on points not applicable here, refers (p. 192) to *Howatson v. Webb* as being “a strong authority for the proposition that a man who executes a deed without inquiring into its character will be bound by it.” In his work on Contracts, 14th ed., p. 161, he states the law as follows:—

“The Courts would not permit one who had entered into a contract to avoid its operation on the ground that he did not attend to the terms which were used by himself or the other party, or that he did not read the document containing the contract, or was misinformed as to its contents, or that he supposed it to be a mere form.”

In *Hunter v. Walters* (1871), L.R. 7 Ch. 75, Mellish, L.J., said:—

“When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed.”

Founded on that case is one of *King v. Smith*, [1900] 2 Ch. 425, from which I quote part of the judgment of Farwell, J. (pp. 430, 431):—

“I accept Mr. King’s statement that he never meant to execute a mortgage; and I assume he was never told that the true effect of that deed was that it was a mortgage; but I have also the fact that he had absolute confidence in his solicitor, and executed any deed relating to his property that Eldred put before him. I apply to that state of things the Lord Justice’s words: ‘When a man knows that he is conveying or doing something with his estate.’ The learned Judge was a most accurate man; and when he said ‘doing something,’ he meant to make a general statement not restricted to a conveyance, or mortgage, or any particular sort of deed. A man who executes a deed put before him by his solicitor knows that he is ‘doing something’ to which that deed relates; and, on the evidence before me, I can come to no other conclusion than that Mr. King knew he was doing something with his property when that deed was put before him. He said in his evidence: ‘When

Eldred told me to sign a deed in connection with my property, I did it.' It is not necessary to find a confirmation of what Mellish, L.J., said, but *Hunter v. Walters* was followed by Chitty, J., in the case of *Lloyd's Bank Limited v. Bullock*, [1896] 2 Ch. 192. Therefore, I hold that this deed is a valid deed as against Mr. King in the hands of Mr. Smith and his co-trustee."

As to the other point, namely, that the guaranties were given only on the condition that a credit of \$15,000 should be procured and that it was not granted, the facts make it impossible to give effect to it.

The credit which the firm had was a yearly one, expiring in December. The bank required security before renewing it, notwithstanding that the firm only desired \$12,000, because the father of one of the partners was to put in \$6,000. The manager of the bank, having found that the house properties had been transferred to the wives, insisted on the guaranties if the credit was to continue and also required mortgage security. The bank got both, and a perusal of the correspondence between the head-office, brought out on cross-examination, and the St. Catharines manager, amply accords with what he had told the Bradleys he must have. See the letter of the 5th April, 1922. Till matters were settled by the giving of the guaranties and mortgages the firm was carried on a temporary credit, and there was no condition as to the \$15,000 attached to the request of the firm. They were practically refused further credit till they complied with the bank's demands.

As to the \$2,500 mortgage made by Ada Bradley for Forster *et al.*, it is contended by the plaintiff bank that the judgment is wholly wrong in requiring the mortgagees to return to the defendant Ada Bradley part of the moneys secured by the mortgage, while the defendant Ada contends that the mortgage is only a security for three sums of \$500 each paid to three specified creditors and interest thereon. I think her evidence leaves no doubt that she advanced \$2,500 to pay pressing creditors of the business, and not only the three named. The \$2,500 was placed to the firm's credit and used to pay the three creditors and others to whom the firm gave cheques. The bank, as a direct creditor, got no part of it. Florence Bradley says as to it as follows:—

"You knew that \$2,500 was to go to Bradley & Son to pay certain creditors that your husband had told you about, didn't you?

A. He said he had to have the money, yes.

"Q. And that was the money, \$2,500? A. Yes.

"Q. And when you signed the mortgage, you knew you were signing a mortgage on your own property for the purpose of enabling this \$2,500 to be raised to be used for that purpose—

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you knew all that, didn't you? A. I knew they wanted \$2,500. I didn't know how much they had to pay their creditors.

"Q. There was no arrangement that you were to get any of the \$2,500? It was all to go to Bradley & Son anyway, wasn't it?

A. My husband didn't tell me it was all. He said some creditors had to be paid.

"Q. And that was the object in giving the mortgage for this amount? A. I suppose.

"Q. There was no deception on your part? You were not deceived about anything? Nothing was misrepresented to you other than were the facts? A. He told me he had to have it, and I had to sign.

"Q. For that purpose? A. Yes.

"Q. And you signed it to help your husband out, as he explained he needed it for this business purpose? A. He said he had to have it, yes.

"Q. He had to have it to pay these creditors? A. Yes."

Mrs. Florence Bradley made a declaration, when proving a claim on the firm's estate on the 13th March, 1924, in which she claimed \$2,900, including the whole \$2,500 due to her for mortgage-moneys advanced, which puts the matter beyond doubt.

The mortgagees being entitled to hold the mortgage for the full amount, \$2,500 and interest, the judgment is erroneous in ordering the bank to pay part of the mortgage-moneys.

The appeals should be allowed and the judgment in appeal set aside. Judgment should be entered for the plaintiff bank with costs of actions and appeals.

MAGEE, J.A., agreed with HODGINS, J.A.

SMITH, J.A.:—I am in agreement with the judgment of my brother Hodgins, but wish to make a few observations in addition to what he has written.

The respondents seek to escape liability on a guaranty given by them to the appellant bank for the debt of their husbands as partners in a mercantile business, on the strength of which a line of credit was granted or continued to the firm by the bank. Two years later the firm failed, owing the bank the amount sued for. The learned trial Judge held that the respondents were not liable on the guaranty, and the bank appeals.

The cases establish that the relation of husband and wife does not come within the class in which it is incumbent on the donee in a transaction to establish that the donors had independent advice, and that in transactions such as those in question there is



no presumption of undue influence, and the burden is on the party attacking the transactions to prove undue influence by the husband and knowledge thereof by the creditor: *Bank of Montreal v. Stuart*, [1911] A.C. 120; *Hutchinson v. Standard Bank of Canada*, 39 O.L.R. 286, and cases there cited.

Mr. Mason, however, argues that, notwithstanding this, the party seeking to enforce such a contract against the wife must establish affirmatively that the document was sufficiently explained to her and that she understood it. He relies on *Bischoff's Trustee v. Frank* (1903), 89 L.T.R. 188; *Turnbull & Co. v. Duval*, [1902] A.C. 429; *Chaplin & Co. Ltd. v. Brammall*, [1908] 1 K.B. 233; and *Howes v. Bishop*, [1909] 2 K.B. 390.

The judgment in *Chaplin & Co. Ltd. v. Brammall* states that it is founded on *Bischoff's Trustee v. Frank* and *Turnbull & Co. v. Duval*. The former of these was overruled: see *Howes v. Bishop*, at p. 397. In *Turnbull & Co. v. Duval*, Campbell, the agent for Turnbull & Co., was at the same time a trustee of property for Mrs. Duval under her father's will, and pressed the husband to get the security from his wife, and this relationship of trustee and *cestui que trust* is made one of the grounds of the decision. The other is that Campbell and Turnbull furnished the document to the husband to get it executed by the wife. "They left everything to Duval, and must abide the consequences" (p. 435). In *Chaplin & Co. Ltd. v. Brammall*, the latter ground is quoted and the judgment proceeds (p. 238):—

"So here the plaintiffs left everything to the defendant's husband; they furnished him with the document. . . ."

This, to my mind, simply means that the plaintiffs in both cases constituted the husbands their agents and were bound by what their agents did. The question of agency is one of fact, on the evidence and circumstances, and has nothing to do with Mr. Mason's proposition of law that I am for the moment considering. *Howes v. Bishop* is not a decision to the effect that Mr. Mason contends for, but there is a reference at p. 397 to *Chaplin & Co. v. Brammall*, in language that lends itself to Mr. Mason's proposition as follows:—

"But in that case there was a finding that the wife's signature was obtained without sufficiently informing her of, and explaining to her, the contents of the document, and that she did not understand it when it was signed by her."

And at p. 402: "But in that case Vaughan Williams, L.J., said, with reference to the facts, 'Ridley, J., has come to the conclusion that in fact no sufficient explanation of it was given to her, and

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that she did not understand it.' On those facts that case was a perfectly plain one, and I fail to see why it was reported."

In *Talbot v. Von Boris*, 27 Times L.R. 95, the wife had endorsed for her husband two promissory notes to the plaintiff for £400 and £100 respectively, on which £250 and £75 respectively had been advanced. The jury found that duress had been exercised by the husband unknown to the plaintiff, that as to the £400 note the substance of the transaction had not been sufficiently explained to her, but as to the £100 note it had, and that as to the £400 note she knew she was incurring a liability for her husband. The plaintiff claimed only the amounts actually advanced. Mr. Justice Phillimore, in giving judgment, after pointing out that *Howes v. Bishop* turned on the question of independent advice, says:—

"The broad and sound principle to follow in a case where a wife became surety for her husband in a transaction under which she was to get an indirect advantage was to make it necessary that the nature of the transaction and what she was doing should have been explained to her."

He cites no authority for this and gives judgment for £100 on the first note and £75 on the other. If the finding that the wife knew she was incurring a liability for the benefit of her husband was sufficient to take the case out of the rule, the learned Judge's statement of the rule was *obiter*. On the other hand, if the rule was applicable, there is no explanation as to why it did not defeat the whole claim on the £400 note. The defendant appealed, but the report ([1911] 1 K.B. 854) deals only with the defence of duress, the onus of proof, and the effect of sec. 30 of the Bills of Exchange Act. The foot-note, p. 855, refers to the defence of lack of sufficient explanation, and states that these matters of defence proved unsuccessful on the facts and no question of law was involved, and this branch of the case is therefore omitted from the report.

Farwell, L.J., at p. 863, says that it makes no difference that the makers were husband and wife, as was decided in *Howes v. Bishop* and *Bischoff's Trustee v. Frank*. Under these circumstances, I do not think this case can be taken as an authority for the proposition under consideration.

If there is a rule of law such as the words quoted state or may imply, it is one arising out of the relationship of husband and wife, and not one of general application. *Howatson v. Webb*, [1908] 1 Ch. 1, and *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489, shew that mere lack of explanation and understanding of a document does not entitle a party making it to relief from its obligation. In view of the settled law already alluded to, that in

such a transaction it is not necessary that the wife should have independent advice, and that there is no presumption of undue influence, there seems to be no principle on which a special rule of law arises out of the relationship of husband and wife, and none was suggested to us on the argument.

In *Bank of Montreal v. Stuart*, the trial Judge held that the wife entered into the agreement with full knowledge of the facts, on her own judgment, without undue influence; but, while their Lordships of the Privy Council do not in express terms make a different finding of facts, it is clear that in their opinion the transaction was not sufficiently explained to her and that she did not understand it beyond the general knowledge that she was undertaking a liability to help her husband. The lack of sufficient explanation and understanding of the document is not put forward as in itself a ground of relief. It was this circumstance, coupled with the fact that Bruce, the bank's solicitor for procuring the security from the wife, was personally interested and undertook to act also for the wife in a matter in which he, the bank, and the husband were all to profit, that formed the ground of the decision.

I am, therefore, of opinion that, even if it is assumed that in these cases the wives did not have the documents sufficiently explained to them and did not fully understand them, that circumstance would not of itself relieve them of liability: in other words, that the proposition of law so ably argued by Mr. Mason cannot be upheld in the light of the latest decisions.

There remains, on the authority of the cases already cited, the contention that the bank constituted the husband and Mr. Lancaster its agents to procure the signatures, and is therefore responsible for what they did or omitted to do. In my opinion, this contention also fails. The bank-manager expressly refused to have the wives advised by the husbands, and refused to accept the document till they were advised by an independent solicitor and until he had the written assurance of the solicitor that he had advised them independently. Mr. Lancaster, the County Attorney, was suggested as a proper party to advise the wives as their solicitor and not on behalf of the bank. It is clear that he was suggested not because of any expectation that he would have the bank's interest in mind, but because he had no ties or connection with the bank, and was in a position to act with entire independence on behalf of the wives. He did advise them and states that he told them that he was speaking to them to give them independent advice on the matter. Under such circumstances, I think it is quite impossible to find as a fact that either the husbands or Mr. Lancaster were acting as agents of the bank in procuring the guaranty.

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The learned Judge has found as a fact that the wives did not understand the document, and that the husbands, or one of them, misrepresented to them its effect. The evidence places the two in practically the same position. The misrepresentation as stated by Ada Bradley is that her husband George Bradley said the document was "a matter of form for the bank," and that "I must sign it as his wife." The husband says he told his wife, in answer to her inquiry, that it was a form required by the bank; that Mr. Forster, the manager of the bank, asked for it. He says that he knew she was incurring liability, and his reason for telling her this was that the assets of the business at the time amounted to from \$22,000 to \$24,000 over all liabilities, and the equity in the building, reckoned at \$10,000, placed the possibility of the wife being held liable to the bank so far in the future that he thought the guaranty a matter of form. The wife admits that the husband told her that the bank said the wives' signature must be on that paper to carry on the business of the Bradley firm. These two wives had originally no property of their own, outside of what one of them got through the husband being a soldier for a time. All came from the firm business, including the purchase-moneys paid on the properties put in their names. They, like their husbands, were getting their living out of the business and were as much interested in keeping it going as the husbands. Is there any reason for supposing that the wife, under the circumstances, understood the husband's statement that the document was a matter of form in any other sense than he says he meant, namely, that owing to the great surplus of assets over liabilities of the firm she was in no danger of being called on under the guaranty. I think that with the knowledge that she was signing a document for the bank in connection with the firm business to enable it to be continued, the natural thing for her to infer from his statement that it was a matter of form was just what he states he meant. In that view of the matter it was not a misrepresentation at all.

In any event her own evidence shews that she knew in a general way that she was undertaking a liability to the bank on behalf of the firm, and that the firm could not continue business unless she signed the document. If Mr. Lancaster's evidence is correct, she knew she was making her own property liable for the firm's debts to the bank. The learned Judge does not discredit Mr. Lancaster, but merely finds that he did not go into all the details of the business so as to inform the wife of the financial situation of the firm, and the full extent of the responsibility being incurred. In cases where independent advice is required as a matter of law a plaintiff might be required to establish that the independent advice covered



these matters, but we are not here dealing with a case where as a matter of law independent advice is required at all.

For these reasons and those stated by my brother Hodgins, I am of opinion that the facts do not bring these cases within the doctrine of *non est factum*, as argued with great force by Mr. Hellmuth.

As to the mortgages it is sufficient to say that I agree with my brother Hodgins.

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MULOCK, C.J.O.:—These cases were tried together by Lennox, J.

In the first mentioned action, Mrs. Ada Bradley, wife of George Bradley, seeks, in respect of certain land owned by her, to restrain the bank from exercising the powers of sale contained in two mortgages dated respectively the 18th April, 1922, and the 3rd January, 1924, made by George Bradley, Alfred E. Bradley, Florence Bradley, and the plaintiff. The second action is brought by the bank against Ada Bradley on a certain document signed by her and the said George Bradley, Alfred E. Bradley, and Florence Bradley, guaranteeing payment of all liabilities of Bradley & Son to the bank. The learned trial Judge held that the mortgages were void as against Ada Bradley, and granted the relief asked for, and dismissed the action of the bank against her on the guaranty. From both of these judgments the bank appeals.

The mortgages and guaranty are in respect of the same indebtedness of Bradley & Son to the bank.

George Bradley and his brother Alfred E. Bradley for about 25 years had been carrying on in partnership the business of grocers in the city of St. Catharines, under the firm name of Bradley & Son, doing their banking business with the St. Catharines branch of the Imperial Bank, of which Mr. Forster was the manager, and the firm had enjoyed with the bank an unsecured credit of \$13,000. In February, 1922, George Bradley applied to the bank to increase this credit from \$13,000 to \$15,000, and the manager, Forster, told him that in order to get such a credit it would be necessary to give as security a mortgage from Ada Bradley and Florence Bradley covering their respective properties, and also their personal guaranty. George Bradley told Forster that he thought there would be no objection to the giving of the guaranty but that there was objection to mortgaging the wives' property. Forster then prepared and delivered the guaranty in question to George Bradley for the purpose of obtaining the signatures thereto of the plaintiff and Florence Bradley, the wife of Alfred E. Brad-



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ley, and at the same time informed George Bradley that the wives should have independent advice.

About the 1st March, 1922, Ada Bradley signed the guaranty. Her account of the circumstances under which she did so is to the following effect. She and her husband were lunching together in their home, and he, having finished his luncheon, arose and withdrew from the dining room apparently to proceed to the store, but immediately returned to the dining room with his overcoat on and having in his hand the guaranty in question and pen and ink, and said to her, "I have a paper here that I want you to sign for the bank." She said, "Oh, why, what have I got to do with the bank?" He said "Oh, nothing. You have nothing to do with the bank. It is really nothing to bother you about at all. It is just a matter of form for the bank that I want you to sign as my wife." Whereupon, she says: "So I took the paper—no I don't believe I did—he laid it on the table before me, placed the pen and ink; I looked down at it and saw the signatures of my brother-in-law, Mr. Alfred Bradley, and his wife, I made some remark, I said: 'Oh, the banks are getting awfully fussy these days' or something to that effect, and signed the paper, thinking no more about it, and that it was a matter of form as he told me. I did not read it. I didn't see anything in fact on the paper but the signatures." She swore that her husband did not explain the paper to her and that all he stated was that it was a matter of form for the bank, and that she, as his wife, must sign it; and that, thinking the guaranty was a mere matter of form, and upon seeing the signatures of Alfred E. Bradley and his wife, she assumed "it was all right." She was unable to remember whether she saw her husband's signature. She said, "I was not interested in my husband's name so much as I was in the others, thinking I was signing in conformity with them." She added, "I had no more thought of the paper at all. I think I was more concerned over the fact that my tea was cold while I had been signing the paper."

Cross-examined, she was asked whether she knew that if she signed the document without knowing what she was signing, she would be bound by it, to which she said: "No, I didn't know that. I thought I was signing merely as a wife of one of the partners, as I would be if he were buying property.

"Q. What did you think you were signing? A. I thought I was signing this matter of form for the bank. ,

"Q. Did you have no curiosity, except as a matter of form, what the document was? A. No, I didn't, I took my husband's word for it.

"Q. Didn't it arouse your curiosity as to what that matter of form was? A. No, it did not.

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"Q. This was the first time your husband had asked you to sign anything as far as the bank was concerned? A. Yes.

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"Q. You had previously signed, when the store had been bought, a mortgage to the loan company, hadn't you? A. I had signed, yes.

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"Q. Tell me how many mortgages you had signed? A. I presume I signed at the time my home was bought; I must have signed. I can't remember that exactly, but I must have signed that the same as when the store was bought.

"Q. You knew also you had signed a mortgage to the loan company? A. Yes.

"Q. When you signed those documents you knew what you were signing? A. I knew I was signing to bar my dower, whatever that meant.

"Q. You ascertained that before you signed it? A. My husband told me I would sign as his wife.

"Q. You satisfied yourself that you were signing to bar your dower? A. I didn't know exactly what barring dower meant, but I knew wives usually signed when husbands bought property."

Asked, with reference to her signing the guaranty, whether she thought it was important when signing it, she answered "no."

"Q. Did nothing cross your mind as to the reason why you were being asked to sign this paper at this time? A. Nothing, aside from thinking that I was signing as a wife signed when her husband bought property. I thought it was the same thing, that I was signing because I was his wife.

"Q. He did not tell you that? A. Yes.

"Q. What did you say he told you about being his wife? What was it he said? A. He said that I should sign because I was his wife.

"Q. Did you know that as a wife you had what was known as a dower interest in your husband's property? A. No, I didn't know that.

"Q. Yet you did know that you had to sign to bar your dower? A. Yes, I knew that.

"Q. If you were asked to bar your dower in property belonging to your husband, would you not think you were giving something up by signing to bar your dower? A. No, I did not.

"Q. You would not know that? A. No.

"Q. That would never occur to you? A. No.

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“Q. You signed without asking to have it read to you, or asking to read it yourself? A. I did . . . Probably because he was in a hurry he did not want to take the time, I have no doubt, to read it to me . . . I never thought of asking him to read it . . . I did not think of reading it over.

“Q. You forgot all about it after that? A. Yes.”

George Bradley swore that Forster told him that in order that the firm should get the line of credit asked for, namely, \$15,000, the guaranty in question would be required, and that he submitted the guaranty in question to his wife for her signature in the manner deposed to by her, saying, “It is just a matter of form, and Mr. Forster has asked me to get you to sign it. She said, ‘It is a silly matter to ask me to sign it.’ I said, ‘It is nothing. It is more of a form that satisfies head-office and Mr. Forster.’

“Q. You were not in such a terrible hurry that you would not have let her read it if she wanted to read it? A. I did not give her much opportunity.

“Q. You did not force her to sign it, you are not suggesting that? A. I told her to sign it. I didn’t force her to sign it.”

In explanation of George Bradley’s statement to his wife that the guaranty was a mere matter of form, he stated that he thought that the firm’s business was in such a satisfactory condition that the possibility of his wife being called upon on the guaranty was so remote as to make her signing it a mere matter of form. He did not even tell her it was a guaranty.

He swore that on the day that his wife signed the guaranty he handed it, in the bank, to Mr. Forster, who said, “This is not worth the paper it is written on, because your wives have not had independent legal advice;” that Forster then asked him who his solicitor was, and on being told Ingersoll & Kingstone, the bank’s solicitors, Forster said that would not do, and named over one or two others, and upon George saying that he did not know them very well, Forster observed, “Well, Ted Lancaster;” I said, ‘Yes, Ted is all right, I know Ted.’” That ended the conversation. He swore that he left the guaranty with Forster and went away and heard nothing more of the guaranty for probably a month, business going on as usual; that in April Forster called him to the bank and stated that the head-office was not satisfied with the guaranty that had been provided, and wanted a second mortgage on the store-property, which stood in the name of the firm, and that in the course of a few days Forster produced for signature the said mortgage of the 18th April, 1922. In this mortgage George R. Bradley, Alfred E. Bradley, Ada Alice Bradley, and

Florence Maud Bradley are described as mortgagors, the two latter being also made parties of the third part for the purpose of barring their dowers; it covers the property of the firm and also Mrs. Ada Bradley's property, being her residence in St. Catharines.

George Bradley swore that he took this mortgage home at lunch hour and told his wife that it was another paper to which the bank required her signature; that she said she did not want to sign it, that she had a short time ago signed a paper for the bank, that "it is funny they want me to sign now another one." "I said, 'You will have to sign this one because I simply have to have this if we are going to continue doing business.' She signed it and I took it back to the store." He swore that he gave her no explanation as to the meaning of this mortgage; that he did not read it to her, but took it back to the store, and there had Wesley Gowan make the affidavit of execution by George Bradley and his wife, although Gowan had not seen the wife execute the mortgage. George Bradley then delivered the mortgage to Forster.

Mrs. Ada Bradley's account of her signing the mortgage of the 18th April, 1922, is to the following effect. The circumstances were very much the same as on the signing of the first paper. It was again at the lunch hour, and Mr. Bradley was in a hurry, as he usually was. "He brought the paper to me, and told me that here is another paper he wanted me to sign for the bank. I said, 'Oh why? I have just signed one a short time ago, it's very strange that the bank should bring another paper to me to be signed so soon.' I said, 'I don't believe I will sign it;' he said, 'Oh now don't be silly,' so I looked at the paper and again I saw my brother-in-law's and his wife's signature. I thought, 'Well, I am silly, if they have signed already it must be all right.' However, I hesitated for a moment. My husband said, 'Now hurry up, I am in a great hurry.' I said, 'I cannot understand this signing two papers so soon for the bank;' he said, 'You must sign because Mr. Forster says we must have your signature in order to carry on business;' so, thinking that it must be all right when Mr. Forster said so, and that the signature of my brother-in-law and sister-in-law were already on, I signed the paper." She swore that she never read it and that her husband did not explain it to her at all.

With reference to her account of her execution of the mortgage of the 3rd January, 1924, it is as follows: "I remember signing another paper which Mr. Bradley told me was 'another.' He said, 'Here is another of those papers for the bank, the same that you signed before a long time ago.'

"Q. When you say 'same as you signed before,' do you mean

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the guaranty or the previous mortgage? A. I mean either or both, because I don't distinguish one from the other to any great extent . . . I thought it was to be a renewal or something of that description . . . and I thought nothing of signing that at all, so I cannot really tell any outstanding thing in connection with it because I hardly recall the paper."

Asked if, when she was asked to sign the second mortgage, her brother-in-law and his wife had signed, she said, "Yes, I think I can say; I am sure, because on each occasion I remember thinking of them signing first, and that I must sign to be in conformity with the others, as the wife of a partner in the firm. I thought it was something of the order of signing, the same sort of thing, I don't know just how, or why. I knew I had signed when he bought property. I supposed this was the same thing." She swore that the document was folded so that she could only see the signatures, and that her husband neither read it to her nor made to her any explanation in regard to it.

On cross-examination she stated that in signing the guaranty she relied upon her husband's statement that it was a mere matter of form.

The learned trial Judge has accepted the evidence of Ada Bradley and her husband George. It is clear from her evidence that her husband misrepresented the nature and effect of the guaranty, and that Mrs. Bradley signed it relying upon his representation that it was a merely a matter of form. The bank, however, sought to prove that she had received legal advice from Mr. Lancaster as to the nature and effect of the guaranty. That gentleman is a practising solicitor in the city of St. Catharines, and was a friend of George Bradley. George Bradley requested him to advise his wife and his sister-in-law as to a document which they had to sign for the Imperial Bank. His recollection was that some one brought him a blank form of a guarantee bond like that in question; that he just looked at it, and saw what its nature was; that three or four days later Mr. Forster called him by telephone and asked if he had advised Mrs. Bradley (Ada Bradley), whereupon he called her up by telephone and he says he told her something to the effect that her husband had requested him to give certain advice to her and her sister-in-law in connection with a document "that they had been asked to sign for the Imperial Bank;" and that Mrs. Bradley told him at that time that she understood what he was talking about; that he told her that she was, by signing that document, pledging her personal estate for the liabilities of Bradley & Son to the bank. "I told her also that she was making herself liable not only for her husband's present indebtedness,

but for any indebtedness that might come about in the future, until such time that she gave notice to the bank of the discontinuance of the guaranty," and that Mrs. Bradley gave him the impression that she understood the subject-matter of what he was talking about, and said she understood all right—"Thank you very much, Mr. Lancaster;" and that ended the conversation. When speaking to her he did not know that the guaranty had already been signed; that some days later the signed guaranty was brought into his office, by whom he could not say, but he was asked to put an endorsement on it for the bank, whereupon he called and inquired from Mr. Forster over the telephone what he desired to have put on the guaranty, and on being told he wrote upon it the following words: "Florence M. Bradley and Ada Bradley have consulted me and have been advised as to the nature and effect of this guaranty. E. A. Lancaster;" and delivered it to the person who had brought it to him.

Mrs. Bradley's account of the conversation with Mr. Lancaster over the telephone is to the following effect. About a month after her signing it, Mr. Lancaster called her up upon the telephone and asked her if she was satisfied with the paper which she had signed, and, recalling her having signed a paper for the bank, she said: "Well, I don't understand just what it means; it was something for the bank, but, as I have already signed it, I suppose that is all there is to it;" and that he said nothing more, whereupon the discussion ended. On cross-examination she swore that she had never had any business dealings with Mr. Lancaster, but knew him as a solicitor in St. Catharines; that her husband had not mentioned having discussed the matter with Mr. Lancaster; that she did not attach any importance to the document. "As I had already signed it, I thought Mr. Lancaster calling up and asking if I was satisfied with a paper that was already signed rather conveyed to my mind that it was not of any consequence, or he would have said something to me before I signed it."

The learned trial Judge has accepted the evidence of Ada Bradley. I agree with him in his finding that her signature to the guaranty was procured by the false representations made to her by her husband as to its nature. It does not appear that because of the guaranty the bank altered its position, and, therefore, I think the guaranty should be declared void as against Ada Bradley, and that the appeal of the bank in its action against her should be dismissed with costs.

As to the two actions of the bank, one of them against Ada Bradley, and the other against Florence Bradley, in respect of the mortgages made by them, and in the pleadings mentioned, for the

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reasons of Hodgins, J.A., I am of opinion that these mortgages are valid and binding, and that the appeals of the bank in the said two actions should be allowed with costs.

FERGUSON, J.A.:—In the second action the Imperial Bank of Canada seeks to enforce a guaranty given by Ada Bradley, wife of George Bradley, for the indebtedness of Bradley & Son to the bank, and two mortgages subsequently given to secure the same indebtedness, the second mortgage expressed to be as collateral security to the guaranty.

In the first action Ada Bradley seeks to restrain the defendants from enforcing the mortgages, and to have it declared that the guaranty is void and not enforceable.

The actions were tried by Mr. Justice Lennox, and he found that all three documents were obtained by George Bradley from his wife Ada Bradley by misrepresentation and without disclosure to her of the nature and effect of the documents, and that she did not understand the same. These appeals are brought by the bank.

Writing the opinion of this Court in *Hutchinson v. Standard Bank of Canada*, 39 O.L.R. 286, at p. 289, I said:—

“The case of *Talbot v. Von Boris*, 27 Times L.R. 95, referred to in Halsbury’s Laws of England, vol. 15, para. 215, appears to be authority for the proposition that a duty is still upon the husband, or the person sustaining a husband and wife transaction, to prove that the nature of the transaction was explained to the wife.

“After carefully reading the evidence, I am of the opinion that the appellant had the document carefully read over and explained to her by Mr. Wherry, who was acting in the transaction as solicitor for her and her husband; that she herself read it over carefully and understood it; that she discussed it and considered it, not only with Mr. Wherry, but with her father, Mr. Beaton, and with her husband.”

The head-note in the *Von Boris* case, reads:—

“Where a wife becomes surety for her husband in a transaction under which she is to get an indirect advantage, the nature of the transaction and what she is doing must be properly explained to her.”

The head-note to the *Von Boris* case is, I think, justified by the opinion of Mr. Justice Phillimore, who delivered the judgment, but that learned Judge cited no authority for the proposition.

It is contended by counsel for the appellant that the proposition is not sound, and is contrary to the authorities, particularly to the



law laid down in *Nedby v. Nedby* (1852), 5 DeG. & Sm. 377, and *Gold Medal Furniture Co. v. Stephenson*, 10 D.L.R. 1.

For the respondent it is contended that the proposition is supported by the *Hutchinson* case (*supra*); *Schwartz v. Guerin* (1922), 65 D.L.R. 415; *Bank of Montreal v. Holoboff*, [1924] 3 D.L.R. 418; *Turnbull & Co. v. Duval*, [1902] A.C. 429; and *Chaplin & Co. Ltd. v. Brammall*, [1908] 1 K.B. 233.

In *Hutchinson v. Standard Bank of Canada*, this Court did not intend to determine that the law was correctly or accurately stated in the *Von Boris* case, but merely that the proposition stated in the *Von Boris* case was not applicable to the circumstances disclosed in the *Hutchinson* case, and I am of opinion that, read in the light of *Nedby v. Nedby* (*supra*), *Gold Medal Furniture Co. v. Stephenson* (*supra*), *Howes v. Bishop*, [1909] 2 K.B. 390, and *Bank of Montreal v. Stuart*, [1911] A.C. 120, the cases of *Turnbull v. Duval & Co.* and *Chaplin & Co. Ltd. v. Brammall* cannot be relied on to support the proposition of Mr. Justice Phillimore in the *Von Boris* case, and further that the proposition therein stated is contrary to the principle underlying and the propositions of law stated in the *Nedby* case, approved in *Howes v. Bishop*, and in *Bank of Montreal v. Stuart*, and that consequently the judgment appealed from cannot be supported on the ground that it has been laid down as an abstract proposition of law that a guaranty of a wife obtained by her husband cannot be enforced unless it be made to appear that the contract had been fully explained to her before she signed it.

That brings me to the question: Should the judgment be supported on the ground that George Bradley, without the knowledge of the bank, misled his wife as to the nature or effect and meaning of the documents, and thus induced her to execute the same under a misapprehension as to either their nature or as to the true purport and effect of the same? I am of opinion that *Bridgman v. Green* (1755), 2 Ves. Sen. 627, *Turnbull & Co. v. Duval*, *Chaplin & Co. Ltd. v. Brammall*, *Bank of Montreal v. Stuart*, and *Musgrave v. Morton* (1924), 57 N.S.R. 369, are all authorities for the proposition that if a creditor and debtor agree that it is in the interest of both that the debtor's wife shall be induced and persuaded to become surety for the husband's debt, and that the husband shall negotiate with his wife to that end and obtain her signature to a document of guarantee, and that it be left to the husband so to negotiate and to persuade his wife so to contract, and to secure the wife's signature to documents embodying such a contract of suretyship, such debtor and creditor may and should be regarded as co-workers and associated as principal and

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agent in the negotiating and procuring of the wife's agreement so to contract and the execution of the documents by her, to the extent and end that the contract of guarantee obtained by the husband shall, in the hands of the creditor, be affected by any breach of duty by the husband in procuring the wife's agreement and signature; and, if it be made to appear that the husband procured the contract and document from his wife by undue influence, fraud, duress, misrepresentation, or other breach of duty, the creditor cannot successfully plead, as against the wife, lack of notice of wrong-doing on the part of the husband.

With reference to what was said by some of the learned Judges who delivered opinions in *Schwartz v. Guerin* and *Bank of Montreal v. Holoboff*, I do not think that the *Hutchinson* case (*supra*) or the *Brammall* case (*supra*) is now authority for the proposition that either the husband or the bank was, irrespective of circumstances and as an abstract proposition of law, under a legal obligation to explain the documents to Mrs. Bradley. On this point see particularly *Nedby v. Nedby* (*supra*) and the *Gold Medal* case (*supra*). Yet, I am of opinion that, while the bank and the husband were not, as an abstract proposition of law, under a duty to explain the documents to the wife, if either undertook to explain or represent the nature of the documents, the person undertaking such a duty was bound not to misrepresent: *Eby-Blain Ltd. v. Matthews* (1924), 56 O.L.R. 383.

Shortly after, if not immediately after, considering, in February, 1922, the financial statement of Bradley & Son, Mr. Forster, the local manager at St. Catharines of the Imperial Bank, made up his mind to get further security for the bank and to do so by pressing or persuading the debtors to persuade and procure their wives to guarantee the debtors' account; and in prosecution of such purpose the bank-manager interviewed George Bradley, and by pressure and persuasion induced Bradley to assist him in attaining his object as something necessary for the benefit of the bank and the firm. Having thus secured the agreement of George Bradley to assist him, Mr. Forster handed to George Bradley the contract of guarantee, with instructions to secure its execution after his wife and his brother's wife had been advised by an independent solicitor, but he left it to George Bradley to see that this was done, and to do whatever was otherwise necessary to induce and procure his partner and the wives of the partners to agree to contract and to execute the document of guarantee. In such circumstances I think that George Bradley, the husband of the respondent, may and should be regarded as one associated with the bank and as agent of the bank in all that he did or omitted to do in con-

nection with accomplishing the bank's object of obtaining the agreement of his wife to contract with the bank, and her execution of the necessary documents, and, on the authorities I have cited, I think the bank cannot take the benefit of a contract procured by the efforts of their associate, freed from any misconduct or breach of duty on his part, and that therefore the result of this appeal turns on whether the execution by Mrs. Bradley of the documents was or was not procured or induced by some breach of duty or misconduct on the part of George Bradley.

The evidence of Mrs. Bradley as to what took place when she signed the document of guarantee is to be found on pp. 16 to 20 of the transcript of evidence.

[The learned Judge then extracted therefrom such parts as appear to him to be relevant, and material. They are substantially the same as set out by HODGINS, J.A., and MULLOCK, C.J.O., *supra*, and need not be repeated.]

I do not think that the evidence I have quoted discloses the exercise of undue influence or pressure, but if believed this evidence is, I think, sufficient to support a finding that, at the time she signed the document of guarantee sued upon, Mrs. Bradley did not know or appreciate either the nature or the scope and effect of the document; also that her husband was well aware of this fact; and further that Mrs. Bradley's misconception and lack of knowledge as to the nature, meaning, and effect of the document, and her failure to read and consider the document, were induced by her husband's statement as to the nature and effect of the document.

The learned Judge has found that the husband misrepresented the nature and effect of the document, and that his wife was misled by such misrepresentations.

In reaching a conclusion as to what effect the statements of George Bradley had upon the mind of his wife, and of the meaning she took out of his words, and what was the state of her mind when she signed the documents, the learned Judge, who had an opportunity of seeing and studying the personality of Mr. and Mrs. Bradley, enjoyed advantages which we have not, and which I think prevent my saying that the learned Judge arrived at an erroneous conclusion as to the state of mind of Ada Bradley at the time she signed the document of guarantee.

That brings me to a consideration of Mr. Lancaster's testimony, and whether or not the learned Judge was clearly wrong in his conclusion that this evidence should not be taken as establishing that any erroneous impression created by the words and conduct of George Bradley in the mind of his wife had been removed, and that Mrs. Bradley did not thereafter, with knowledge of her

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rights, elect to ratify, adopt, and confirm, as her proper act and deed, a document she had previously signed under a misapprehension.

I am of opinion that, in the circumstances disclosed by the evidence, the onus of establishing that Mr. Lancaster's telephone conversation with Mrs. Bradley had the effect of disabusing her mind of any erroneous impression she had been labouring under in reference to the document, and of causing her to realise that she was, at that time, in a position to withdraw from the document, was on the bank.

Again, I am of opinion that a good deal turns on the experience and personality of Mrs. Bradley as to the credit to be given to her statement as to the impression Mr. Lancaster's conversation made upon her mind; and, on a careful reading of Mr. Lancaster's evidence, and a consideration of the circumstances surrounding the conversation, I am unable to say that the learned Judge, who saw both the witnesses, erred in concluding that Ada Bradley did not, from the conversation, gather and appreciate either the true nature, meaning, and effect of the document, or that she was then in a position to withdraw therefrom.

For these reasons, I am of opinion that the judgment in respect of the document of guaranty should be affirmed.

That brings me to a consideration of the two mortgages executed by Ada Bradley, subsequent to the execution of the document of guaranty.

While the evidence in reference to the circumstances surrounding the execution of these two documents points to execution without knowledge of the real nature and effect of the documents, it indicates that this lack of knowledge and consequent self-deception was due to lack of care on the part of Mrs. Bradley, rather than to misrepresentation on the part of her husband, yet I think the evidence justifies the conclusion that the husband knew that his wife was executing the documents not only without knowledge of their true nature and effect, but also under a misapprehension as to their nature, effect, and meaning; and I am of opinion that such knowledge cast upon the husband a duty to remove from the mind of his wife any misconception which he knew she was under, or accept the documents as having only the meaning and effect his wife thought they had: *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, at pp. 610, 611; and, if I be right in my opinion that the facts are such as justify us in holding that the husband may and should be regarded as a co-worker with, associate of, and agent of the bank in negotiating the contract and procuring the documents for the bank, it follows that these documents in the hands of the bank



are also subject to attack by the wife by reason of the husband's breach of duty.

I would dismiss the appeal with costs.

In the action brought by the bank against Florence Bradley, for the reasons stated by my brother Hodgins, I would allow the appeal of the bank and Forster in respect of the mortgage-moneys secured by the mortgage made by Florence Bradley to Foster dated the 11th December, 1923.

Adopting the findings of the learned trial Judge in reference to the way in which Mrs. Bradley's signature to the guaranty was obtained by her husband, and applying the principles and propositions I have enumerated in the Ada Bradley case, I would dismiss with costs the bank's appeal in reference to the document.

*Appeals allowed (MULOCK, C.J.O., and FERGUSON, J.A.,  
dissenting in part.)*

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#### [APPELLATE DIVISION.]

#### NORTHERN TRUSTS Co. v. McLEAN.

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*Covenant—Mortgage of Land in Alberta—Covenant for Payment Contained in Mortgage-deed—Action on, in Ontario Court—Application of Alberta Statute Dealing with Procedure for Realisation of Judgment—Proof of Alberta Statute—Ontario Evidence Act, sec. 22—Construction of Foreign Statute—Covenant not Necessary Part of Mortgage Security.*

Under sec. 22 of the Evidence Act, R.S.O. 1914, ch. 76, the contents of a statute of any Province within the King's dominions may be proved by the production of a copy purporting to be printed under the authority of the Legislature of that Province; and, a proper copy being produced at the trial of an action, the statute must be regarded and its meaning ascertained by the trial Judge, in the absence of expert evidence based on local decisions or later legislation.

A statute of the Province of Alberta dealing only with the remedy in an "action brought upon a mortgage of land," and settling the form of judgment for the realisation of the debt out of the mortgaged property, does not apply to an action brought on the covenant for payment contained in a mortgage-deed of Alberta land, in which the judgment must be limited to a personal order on the defendant to pay the amount.

The action was brought for a specialty debt arising on a covenant under seal; and, although the covenant was contained in a mortgage-deed, it was not a necessary part of the mortgage security, and a separate action lay.

*Economic Life Assurance Society v. Usborne*, [1902] A.C. 147, and *Allan v. McTavish* (1878), 2 A.R. 278, applied and followed.



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AN appeal by the defendant from the judgment of MOWAT, J., of the 10th December, 1925, in favour of the plaintiff in an action upon the covenant for payment contained in a mortgage of land situated in the Province of Alberta.

February 23. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and SMITH, JJ.A.

*G. Morehead*, for the appellant, argued that, since the action arose out of a mortgage of land situate in Alberta, the law of that Province governed, and, therefore, the plaintiff was limited to the rights given to him by sec. 37(o) of the Judicature Act of Alberta, R.S.A. 1922, ch. 72. Reference to *Bent v. Young* (1838), 9 Sim. 180; Dicey on Conflict of Laws, 3rd ed., p. 609.

*F. C. Betts*, for the plaintiff, respondent, contended that the Alberta law did not apply. The action was not one relating to land, but was a personal action on a covenant. The proper jurisdiction in which to bring an action on a covenant is that in which the defendant resides. Therefore, the action was properly brought in Ontario. Reference to *Paget v. Ede* (1874), L.R. 18 Eq. 118; *Bullock v. Caird* (1875), L.R. 10 Q.B. 276; Dicey on Conflict of Laws, 3rd ed., p. 762.

April 19. The judgment of the Court was read by HODGINS, J.A.:—Appeal by the defendant from the judgment of Mowat, J., in favour of the plaintiff in an action on a covenant to pay contained in a mortgage on lands in Alberta.

Objection was taken at the trial (repeated before us) to the proof of the Alberta Judicature Act) R. S. Alta. 1922, ch. 72, sec. 37(o), and the learned trial Judge rejected it as not having been properly proved. His attention was not called, as it should have been, to the provisions of the Evidence Act, R.S.O. 1914, ch. 76, sec. 22, the material words in which are:—

“Copies of statutes . . . purporting to be printed . . . by or under the authority of . . . any legislative body of any Dominion . . . Province . . . within the King’s dominions, shall be admitted in evidence to prove the contents thereof.”

Now, while the foreign law is a question of fact and is usually and properly to be proved by experts in the particular foreign law in question, this enactment makes the contents of a provincial statute to be good evidence in the cause. If so, the language of the statute, if a proper copy is produced, must, like any other evidence, be regarded, and its meaning ascertained, by the presiding Judge at the trial. Expert evidence is of course admissible

upon it if based on local decisions or later legislation, but in the absence of such evidence its meaning will be that which the Courts in this Province determine. From the notes of evidence it is probable that the learned counsel for the defendant had the volume of the Alberta statutes before him in which the section relied on was cited from at p. 937 (R.S. Alta. 1922, ch. 72, sec. 37(o), p. 937). If so, the ruling at the trial was wrong, and I think we must allow the contents of the statute in question to be read into the evidence here from the Revised Statutes of Alberta in our library, and construe its meaning and effect on the rights of the parties. As it only came into force in 1920, while the mortgage was executed in 1917, it is clear that the contract, as such, had no reference to it. The affidavit of the due execution of the mortgage and also that of the defendant himself as to ownership and age are sworn in London, Ontario. The plaintiff is not, however, so I am told, able to take advantage of the permission given on the hearing to procure an affidavit as to the place of execution. At the trial the defendant deposed that he *resided* in Alberta when the mortgage was executed; but, in answer to a question, "I think you formerly resided in Alberta. And when did you come to London?" answered, "I have resided in London—I have just been going out there twice a year." As the affidavits on the mortgage-deed are not in themselves evidence, and the defendant was not asked about them, the actual place of execution cannot be taken as legally established. But this point is not necessary to the plaintiff's success. The defendant admits the execution of the mortgage-deed and the amount claimed.

The Alberta statute deals only with the remedy in an "action brought upon a mortgage of land," and it settles the form of judgment for the realisation of the debt out of the mortgaged property, but gives the Judge power to order otherwise. It is procedure only, and deals wholly with the remedies which may be open to the parties after judgment. Being limited to actions brought on mortgages of land, it does not include such an action as the present. No question of substantive rights can possibly arise, as its provisions are strictly limited to the way in which "the amount adjudged or ordered to be paid by the defendant" shall be realised.

"The policy of the English law recognises no vested rights in procedure, and a party invoking the jurisdiction of the courts must take procedure as he finds it. The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy, and the course of the court with regard to the kind of

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App. Div. relief that can be granted to a suitor:" *Livesley v. E. Clemens*  
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Nor are the provisions of the statute in any way binding upon us, as the judgment in this action is not concerned with the remedies provided for by the Alberta statute, and is and must be limited to a personal order on the defendant to pay the amount, which he does not dispute.

The action is brought for a specialty debt arising on a covenant under seal, which was produced and put in at the trial, the defendant now residing in Ontario. The effect of such covenants is, as explained in *Cooté on Mortgages*, 8th ed., p. 9, "to create a personal contract between the mortgagor and mortgagee for payment of the money, and to render the mortgagee to whom they are given a specialty creditor, but such covenants are not a necessary part of the mortgage security." This statement is largely founded on what is stated by Lord Davey in *Economic Life Assurance Society v. Osborne*, [1902] A.C. 147, 153-4. Upon such a covenant, though contained in a mortgage-deed, a separate action can be brought, and such an action was, in *Allan v. McTavish* (1878), 2 A.R. 278, held not to be barred by the Statute of Limitations applicable to money charged upon lands but to be governed by the provisions relating to specialty debts, notwithstanding that it was found in a mortgage-deed. See also *Sinclair v. Jackson* (1853), 17 Beav. 405, 413. *Allan v. McTavish* was followed down to 1894, when a change was made in the law by cutting down the 20 years to 10 years on covenants executed after 1894, but the amendment effected no change in the distinction between such a debt and money charged on land. See the Limitations Act, R.S.O. 1914, ch. 75, sec. 49(b), (k).

*Appeal dismissed with costs.*

## APPENDIX.

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Ontario cases decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of vol. 57 of the Ontario Law Reports:—

HOWLETT v. PENINSULAR SUGAR CO. LTD., 28 O.W.N. 19, reversed by the Supreme Court of Canada: PENINSULAR SUGAR CO. LTD. v. HOWLETT, [1926] S.C.R. 18.

HUFFMAN v. ROSS, 57 O.L.R. 329, reversed by the Supreme Court of Canada: HUFFMAN v. ROSS, [1926] S.C.R. 5.

NORTHERN GRAIN CO. LTD. v. GODERICH ELEVATOR AND TRANSIT CO. LTD., 57 O.L.R. 1, reversed by the Supreme Court of Canada: NORTHERN GRAIN CO. v. GODERICH ELEVATOR AND TRANSIT CO., [1926] S.C.R. 120.

ST. MICHAEL'S COLLEGE v. CITY OF TORONTO, 27 O.W.N. 474, in part reversed by the Supreme Court of Canada: ST. MICHAEL'S COLLEGE v. CITY OF TORONTO, [1926] S.C.R. 318.

TORONTO, CITY OF, v. TORONTO ROMAN CATHOLIC SEPARATE SCHOOL BOARD, 54 O.L.R. 224, reversed by the Supreme Court of Canada, [1924] S.C.R. 368, but restored by the Judicial Committee: TORONTO CORPORATION v. ROMAN CATHOLIC SEPARATE SCHOOLS TRUSTEES, [1926] A.C. 81.





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